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THE
STATUTES AND ORDERS
RELATING TO THE
PRACTICE AND JURISDICTION
OF THE
COURT OF CHANCERY;
AND OF THE
COURT OF ERROR AND APPEAL,
WITH NOTES.

BY
THOMAS WARDLAW TAYLOR, M.A.,
OF OSGOODS HALL, BARRISTER-AT-LAW.

THIRD EDITION.

TORONTO:
ADAM, STEVENSON & Co., LAW PUBLISHERS.

1868.

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TORONTO:
A. LOVELL & CO., LAW AND GENERAL PRINTERS,
YONGE STREET.

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PREFACE TO THE THIRD EDITION.

Since the last edition of this work was published several important statutes affecting the Court of Chancery have been added to the Statute Book.

Of these the Chancery Act, 28 Vic., c. 17, extending the jurisdiction of the Court in matters of Lunacy, the Act for Quietting Titles and the Property and Trusts Act are included in this edition. The sections of the Acts relating to County Courts, the Limitation of Actions, and Evidence, printed in the last edition, have been omitted, and in their place the Law Stamp Act, and those important sections of the Attorneys' Act, providing for the delivery and taxation of bills of costs have been given.

During the present year the work of consolidating the General Orders of the Court has been accomplished.

This will prove a great boon to the profession, for although the consolidation is not so perfect as might be wished, the Orders of Court are now collected together and reduced to a more manageable form.

A Table of the Abrogated Orders shewing the Consolidated Orders into which they are incorporated is prefixed to this edition.

Thanks are due to Mr. G. M. Rae for the care and labour he has bestowed upon the preparation of the Index.

OSGOODE HALL,
October, 1868.

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SUBROGATION

IMPRISONMENT

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CHANCERY ACT.

CON. STAT. U. C., CAP. XII.—AN ACT RE-
PECTING THE COURT OF CHANCERY.

ERRATA.

Page 21, line 14, *for* recovery, *read* re-convey.

" 73, " 14, *for* the order, *read* this order.

" 75, " 28, *for* used, *read* need.

" 88, " 22, *for* petitioners, *read* petitions.

" 122, " 22, *for* selling, *read* settling.

" 282, " 1, *for* fourteen, *read* four.

" 300, " 40, *for* on a Court, *read* in a joint.

... Judges, to be called Vice-Chancellors.
12 V. c. 64, s. 1.

IV. Her Majesty may from time to time, as vacancies occur, appoint, by Letters Patent under the Great Seal of this Province, one person, being a Barrister at Law of not less than ten years' standing at the Bar of Upper Canada, to be Chancellor, and two persons, being Barristers of not less than ten years' standing at the said Bar, to be Vice-Chancellors; and the Chancellor of Upper Canada shall have rank and precedence next after the

- Wilkens v. Stevens, 127.
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CHANCERY ACT.

CON. STAT. U. C., CAP. XII.—AN ACT RESPECTING THE COURT OF CHANCERY.

HER MAJESTY, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

I. The Court of Chancery now existing in Upper Canada is hereby continued, and shall continue to be called the Court of Chancery for Upper Canada. 7 W. 4, c. 2, s. 1.

II. The Governor in Council may, from time to time, determine and declare the seal to be used in the Court, and by which its judgments and proceedings shall be certified and authenticated. 7 W. 4, c. 2, s. 18.

III. The Court shall be presided over by a Chief Judge, to be called the Chancellor of Upper Canada, and two additional Judges, to be called Vice-Chancellors. 12 V. c. 64, s. 1.

IV. Her Majesty may from time to time, as vacancies occur, appoint, by Letters Patent under the Great Seal of this Province, one person, being a Barrister at Law of not less than ten years' standing at the Bar of Upper Canada, to be Chancellor, and two persons, being Barristers of not less than ten years' standing at the said Bar, to be Vice-Chancellors; and the Chancellor of Upper Canada shall have rank and precedence next after the

Chief Justice of Upper Canada ; and the Vice-Chancellors and the Puisné Judges of the Superior Courts of Common Law shall have rank and precedence as between themselves according to seniority of appointment to their respective Offices. 12 V. c. 64, s. 2.

V. The Judges shall hold their offices during good behaviour; but the Governor in Council may remove any of them upon the address of the two Houses of the Parliament of the Province; and in case a Judge so removed thinks himself aggrieved thereby, he may within six months appeal to Her Majesty in Her Privy Council, and in that case such amotion shall not be final until the appeal has been determined by Her Majesty in Her Privy Council. 12 V. c. 64, s. 3.

VI. In respect to the salaries of the Judges, there shall, out of the Consolidated Revenue Fund of the Province, (after paying or reserving sufficient to pay all such sums as were before the thirtieth of May, one thousand eight hundred and forty-nine, directed by any Act of Parliament of this Province, to be paid out of the same, but with preference to all other payments thereafter charged upon the same) be paid to the Chancellor, five thousand dollars per annum; and to each of the other Judges, four thousand dollars per annum; and these sums shall be paid quarterly, free from all taxes and deductions, on the first day of January, the first day of April, the first day of July, and the first day of October, by equal portions, the first payment to be made on the first of those days which occur after the appointment of the Judge entitled to receive the same; and in case any of the Judges be removed from office or die or resign office, such Judge or his executor or administrator shall be entitled to receive such proportionable part of the salary as accrued during the time that he executed the office subsequent to the last payment, and the successor to the office

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vacated by such Judge shall receive such portion of the salary as accrues from the day of his appointment. 12 V. c. 64, s. 4.

VII. In case any Judge of the said Court of Chancery has continued in the office of a Judge of one or more of the Superior Courts of Law or Equity in Upper Canada, for fifteen years, or becomes afflicted with some permanent infirmity disabling him from the due execution of his office, and in case such Judge resign his said office of Judge, Her Majesty may, by Letters Patent under the Great Seal of this Province, reciting such period of service or permanent infirmity, grant unto such Judge an annuity equal to two-thirds of the salary annexed to the office of such Judge, to commence immediately after the period of his resignation and to continue thenceforth during his natural life; and such annuity shall be charged upon and be paid out of the Consolidated Revenue Fund of this Province, after paying or reserving sufficient to pay all such sums of money as by any Acts of the Parliament of this Province in force on the thirtieth day of May, one thousand eight hundred and forty-nine, have been directed to be paid thereout, but with preference to all other payments thereafter charged upon the same fund; and such annuity shall be paid quarterly, by equal portions on the first days of January, April, July and October, in each year, free from all taxes and deductions whatsoever; and the first quarterly payment, or a proportionate part thereof to be computed from the time of his resignation, shall be made on such of the said days as next happens after the resignation; and the executors or administrators of the person to whom the annuity has been granted shall be paid such proportionate part of the same as accrued from the commencement, or the last quarterly payment thereof, as the case may be, to the day of his death. 12 V. c. 64, s. 5.

VIII. Every Judge shall, previous to executing the duties of his office, take the following oath, which oath shall be administered to the Chancellor before the Governor in Council, and to the Vice-Chancellors in open Court in presence of the Chancellor: 12 V. c. 64, s. 6.

"I, _____, do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me, as Chancellor (or Vice-Chancellor). So help me God."

IX. The Governor in Council may, from time to time, under the Great Seal of the Province, appoint during pleasure, one Registrar, one Master in ordinary, one Accountant, and a Sergeant-at-Arms, to the Court; and these Officers shall, in addition to the duties usually performed by the like officers in England, be liable to perform any other duties assigned to them by the Court. 7 W. 4, c. 2, s. 9,—12 V. c. 64, s. 12.

X. The Registrar and Master in ordinary may each appoint one Clerk, subject to the approval of the Judges, and may with the like approval remove such Clerk at pleasure. 13, 14 V. c. 50, s. 3,—12 V. c. 64, s. 12.

XI. The Master in ordinary, Registrar, or Clerk so appointed, shall not take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled by law; but the like sums and fees heretofore payable and receivable in the Court shall continue to be payable and receivable by the like persons; and all the fees received by or on account of the Master and Registrar, shall form part of the Consolidated Revenue Fund of the Province. 12 V. c. 64, s. 13.

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By the 27 and 28 Vic. c. 5, all the fees mentioned in this section are made payable by Stamps.

XII. The Master in ordinary and Registrar respectively shall, on the four quarterly days hereinbefore mentioned, render to the Minister of Finance a true Account in writing of all the fees received by or on account of his office, in such form and with such particulars as the Minister of Finance from time to time requires; and shall sign the account, and declare the truth thereof before one of the Judges of the Court; and shall, within ten days after rendering the account, pay over the amount of the fees to the Receiver General; and if default be made in such payment, the amount shall be deemed a specialty debt to Her Majesty. 12 V. c. 64, s. 14.

XIII. The Judges may, from time to time, under the Seal of the Court, appoint, and at their discretion remove, local Masters and Deputy Registrars (both of which offices may be held by one person,) in such places respectively out of Toronto, as the Judges may think expedient for the purpose of promoting as far as practicable the local administration of Justice; and the Judges may likewise in manner aforesaid, appoint and remove Commissioners for administering oaths and taking affidavits and depositions in the said Court with the powers formerly possessed by Masters Extraordinary and Examiners; and also an Usher to attend on the Court, and the respective Judges thereof, during the sittings of the Court and Judges respectively for the transaction of business, and to execute such process of the Court as may be directed to him. 13, 14 V. c. 50, s. 1,—20 V. c. 56, ss. 17, 19,—7 W. 4, c. 2. s. 10.

A bill of complaint may be filed either with the Clerk of Records and Writs, or in the office of a Deputy Registrar, at the option of the plaintiff, *Ord.* 77; but all the subsequent pleadings must be filed in the same office as the bill, *Ord.* 72.

Local Masters and Deputy Registrars respectively are to perform the duties of their several offices in the same manner, and under the same regulations as the like duties are performed by the Master and by the Clerk of Records and Writs respectively; and all orders, rules and regulations, in force respecting the Master and Clerk of Records and Writs respectively, and respecting the regulations of their respective offices, are to be in force and applicable to the Local Masters and Deputy Registrars respectively, in relation to such duties as they are required to perform; and the like sums and fees payable to the Master and Clerk of Records and Writs respectively, are to be payable to the Local Masters and Deputy Registrars respectively in relation to similar matters, *Ord. 84.*

Where the bill is filed in an outer County, the Local Master may also hear and dispose of all applications in the progress of the suit, for the following purposes, viz:—to appoint guardians *ad litem* for infants,—for time to answer or demur,—for leave to amend before replication,—to postpone the examination of witnesses, or to allow further time for the production of evidence,—for security for costs, *Ord. 86.*

All office copies of decrees to be served on parties, added in the Master's office, may be certified by the Deputy Registrar, at the place where the reference is being prosecuted, *Ord. 547*; Deputy Registrars are also required to transmit to the Clerk of Records and Writs at Toronto, every six months, a list of all bills filed with them during the preceding half year, *Ord. 39.* Certificates of the filing of bills, and certificates of decrees for registration, may also be given by Deputy Registrars, *Con. Stat. U. C., c. 12, ss. 64, 65.*

XIV. There shall be paid out of the Consolidated Revenue Fund of the Province, (after paying or reserving sufficient to pay all such sums as were directed by any Act of the Parliament of this Province before the Thirtieth day of May, one thousand eight hundred and forty-nine, to be paid thereout, but with preference to all payments thereafter charged upon the same) the yearly sums following as and for the salaries of the Master in ordinary, the Registrar and the Clerk of the Registrar, that is to say; to the Master, two thousand dollars; to the Registrar, one thousand six hundred dollars; and to the Clerk, five hundred dollars; which sums shall be paid quarterly, free from all taxes and deductions, on the four quarterly days hereinbefore mentioned; but the payment to be made in each case on the first of the

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quarterly days which happens after the right thereto accrues, shall be a rateable proportion of a Quarter's Salary, according to the time then elapsed since the accrual of the right ; and in case of a vacancy in the office of such Master, Registrar or Clerk, the person making the vacancy, his executors or administrators, shall be entitled to a proportional part of his salary according to the time elapsed between the vacancy and the last quarterly payment ; and there shall also be paid out of the Consolidated Revenue Fund of the Province (after paying or reserving sufficient to pay all such sums as have been directed by any Act of the Parliament of this Province before the tenth day of August, one thousand eight hundred and fifty, to be paid out of the same, but with preference to all payments thereafter charged upon the same) the yearly sum of five hundred dollars, for the salary of the Clerk in the Master's Office. 12 V. c. 64, s. 12,—13, 14 V. c. 50, s. 3.

XV. The local Masters, the Deputy Registrars, and the Commissioners may retain to their own use all the fees of office which they respectively receive not belonging to any fee fund, and need not account to the Crown for any portion of such fees. 20 V. c. 56, s. 16.

XVI. The Governor in Council may, from time to time, appoint an additional Clerk or additional Clerks in the Court, when the business of the Court requires the same and the Judges of the Court apply for such appointment, and the Clerk or Clerks shall perform such duties as the Court may, from time to time, by general orders or otherwise, direct. 20 V. c. 56, s. 18.

XVII. Every Officer of the Court before he enters upon his duties shall take and subscribe the following oath, which oath shall be administered by the Judges, or one or more of them in open Court :

"I, A. B., of _____, do hereby solemnly swear, that I will, according to the best of my skill, learning, ability and judgment, well and faithfully execute and fulfil the duties of the office of Master, &c., (*as the case may be*), without favour or affection, prejudice or partiality, to any person or persons whomsoever. So help me God." 7 W. 4, c. 2, s. 20.

XVIII. When not convenient to a person appointed to any office to attend at Toronto, to take the oath of office, the Court may direct the oath to be taken before the Judge of the County Court of the County in which such Officer resides, and the oath shall be certified by such Judge and filed in the Office of the Registrar. 1 V. c. 14, s. 3.

XIX. Sheriffs, Deputy Sheriffs, Gaolers, Constables and other Peace Officers, shall aid, assist and obey the Court and the Judges thereof respectively in the exercise of the jurisdiction conferred by this Act, and otherwise, whenever by any general or other order of the Court or of a Judge thereof, required so to do. 20 V. c. 56, s. 6, —7 W. 4, c. 2, s. 14.

All commissions of sequestration are to be directed to the sheriff, unless some good reason exists for the contrary, *Ord.* 292.

XX. The Court shall be holden at the City of Toronto or in any other place from time to time appointed by Proclamation of the Governor. 7 W. 4, c. 2, s. 1.

XXI. The Judges shall sit together for all business not directed by general or other orders to be transacted before a single Judge, and in such case the Chancellor or, if he be absent, the Senior Vice-Chancellor, shall preside. 12 V. c. 64, s. 7.

At present all causes are heard before a single Judge in the first instance; either on circuit, when issue has been joined, and witnesses have

been examined before the full Court in all cases, the day in August.

XXII. The same time for the posing of business directed by decrees shall have purpose shall be otherwise or other every J elsewhere subject 56, s. 7.

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been examined, or at Toronto, on motions for decree, or *pro confesso*. The full Court of three Judges sits at Toronto, for the purpose of re-hearing causes, three times a year, on the third Thursday in February, last Thursday in August, and first Thursday in December, *Ord.* 413.

XXII. The Judges may sit separately, either at the same time or at different times, for the hearing and disposing of such matters and the transaction of such business as may from time to time in that behalf be directed by general or other orders of the Court; and the decrees and orders made by a single Judge in such cases shall have the force and effect of, and be deemed for all purposes to be, decrees and orders of the Court, but shall be subject to re-hearing before the full Court or otherwise, in such cases as the Court, by general orders or otherwise, from time to time directs or appoints; and every Judge so sitting separately, whether at Toronto or elsewhere, shall have all the powers of the full Court, subject to any general orders in that behalf. 20 V., c. 56, s. 7.

The Judges availing themselves of the power given by this section, sit in Court separately, on alternate weeks. Monday is appropriated to the hearing of causes and demurrers, Tuesday to motions, and the remaining days of the week to hearings *pro confesso*, motions for decree, further directions, petitions, and appeals from Masters' reports. *Ord.* 416.

XXIII. The Judges, or one or more of them, shall also take circuits for the transaction of such business of the Court as it may be practicable and conducive to the interests of suitors and the convenient administration of justice to dispose of on such circuits; and for that purpose, the Court, or one or more of the Judges thereof, may hold sittings for the purposes of taking such evidence and hearing such causes and other matters, and transacting such other business, and at such periods and at such County Towns, as the Court from time to time sees fit to direct and appoint; and such sittings may, at the discretion of the Court or of the Judge who is to hold the

same, be held in the Court House of the County Town in which the same are appointed to be held, or in such other place in the County Town as the Judge selects; and the Judge shall in all respects have the same authority as a Judge at *Nisi Prius* in regard to the use of the Court House, Gaol and other buildings or apartments set apart in the County for the administration of justice. 20 V. c. 56, s. 6.

In pursuance of the authority given by this section the Court has divided the Province into three circuits, and has appointed a number of County Towns as places at which witnesses may be examined and causes heard.

The Venue must be laid at one of the Towns so appointed for holding examinations, *Ord.* 74.

Causes are now heard at the same time that the witnesses are examined, upon the close of such examination; no evidence to be used on the hearing of a cause is to be taken before any Examiner or Officer of the Court, unless by the order first had of the Court, or a Judge thereof, upon special grounds adduced for that purpose, *Ord.* 166. It is presumed the application to have the evidence taken otherwise than before the Court, must be on notice, and not *ex parte*.

When the examination of witnesses before a Judge is to be had in any Town or place other than that in which the pleadings are filed, the party setting down the cause must procure the transmission of the pleadings and such other documents as may be required, from the office in which they are filed, to the Registrar or Deputy Registrar, at the place where the examination is to take place, *Ord.* 165.

XXIV. All witnesses in any business pending before the Court, or before any of the Masters thereof, shall give their testimony *viva voce*, and be subject to examination by Counsel, in the presence of one or more of the Judges, or of the Masters, unless it be otherwise ordered by the Court, on special grounds, or with the consent of the parties in the suit or controversy to which the testimony relates. 7 W. 4, c. 2, s. 5.

XXV. The rules of decision in the Court shall, except when otherwise provided, be the same as governed the Court of Chancery in England in like cases on the fourth

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day of March, one thousand eight hundred and thirty-seven, and the Court shall possess power to enforce obedience to its orders, judgments and decrees, to the same extent as was then possessed by the Court of Chancery in England. 7 W. 4, c. 2, s. 6,—12 V. c. 64, s. 9.

XXVI. The Court shall have the like jurisdiction and power as by the laws of England were at the said date possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say:—(1.) In all cases of fraud and accident; (2.) And in all matters relating to trusts, executors and administrators, co-partnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates; (3.) And also to stay waste; (4.) To compel the specific performance of agreements; (5.) To compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same; (6.) To prevent multiplicity of suits; (7.) To stay proceedings in a Court of Law prosecuted against equity and good conscience; (8.) To decree the issue of Letters Patent from the Crown to rightful claimants; (9.) To repeal and avoid Letters Patent issued erroneously or by mistake or improvidently or through fraud; (10.) And generally, the like jurisdiction and power as the Court of Chancery in England possessed on the tenth day of June, one thousand eight hundred and fifty-seven, as a Court of Equity to administer justice in all cases in which there exists no adequate remedy at Law. 7 W. 4, c. 2, s. 2,—16 V. c. 159, s. 21,—13, 14 V. c. 50, s. 4,—20 V. c. 56, s. 1,—12 V. c. 64, s. 8.

XXVII. The Court may grant an injunction to stay waste in a proper case, notwithstanding that the party in possession claims by an adverse legal title. 20 V. c. 56, s. 4.

1. Fraud & accident
2. Trusts, executors & administrators, co-partnership & account, mortgages, awards, dower, infants, idiots, lunatics & their estates
3. Stay waste
4. Specific performance of agreements
5. Discovery of concealed papers or evidence
6-7. Prevention of multiplicity of suits
8. Stay of proceedings in a Court of Law
9. Issue of Letters Patent from the Crown to rightful claimants
10. Repeal & avoidance of Letters Patent issued erroneously or by mistake or improvidently or through fraud
And generally, the like jurisdiction and power as the Court of Chancery in England possessed on the tenth day of June, one thousand eight hundred and fifty-seven, as a Court of Equity to administer justice in all cases in which there exists no adequate remedy at Law.

XXVIII. The Court shall have jurisdiction to try the validity of Last Wills and Testaments, whether the same respect real or personal estate, and to pronounce such Wills and Testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments. 12 V. c. 64, s. 10.

XXIX. The Court shall also have jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for a restitution of conjugal rights; and alimony when decreed shall continue until the further order of the Court. 7 W. 4, c. 2, s. 3,—20 V. c. 56, s. 2.

In suits for alimony the Court or a Judge thereof may, in a proper case, order a writ of arrest to issue at any time after the bill has been filed, and shall in the order fix the amount of bail to be given by the defendant, in order to procure his discharge, *Con. Stat. U. C.*, c. 24, s. 9; the amount of bail shall not exceed sufficient to cover the amount of future alimony for two years, besides arrears and costs, but may be for less at the discretion of the court, *Ibid.*, s. 10.

Although in England the mere fact of desertion by the husband, will not entitle the wife to a decree for alimony; still, as in this country, the court cannot decree restitution of conjugal rights, desertion would be sufficient to warrant a decree for alimony, and desertion coupled with other acts of cruelty forms a material ingredient in determining a wife's right to relief, *Severn v. Severn*, 3 Grant, 431.

The bill should allege that the husband has refused to receive his wife; it is not sufficient to allege merely that they are living apart, *Walsh v. Walsh*, 1 Cham. R. 234.

An offer by the husband to support his wife separately is no bar to a suit for alimony, and an affidavit of the husband showing his willingness to support his wife separately cannot be received, *Weir v. Weir*, 1 Cham. R. 194; 10 Grant, 565; and the Court will not sanction the payment by the husband of a sum in gross, in lieu of an annual sum by way of alimony, *Hagarty v. Hagarty*, 11 Grant, 562.

Where, a wife was found in the opinion of the Court, physical violence to her husband had been occasioned, strong proof of the Court's jurisdiction.

The Court in *Soules v. Soules*.

As to the Court's jurisdiction to decree alimony, see *Nolan v. Nolan*, 10 Grant, 565; and *affidavit of alimony*, giving such a decree, see *married*, 10 Grant, 565.

Where a husband carries the wife to the Court, the costs of such a motion, and costs of the Court, see *McKay*, 6 Grant, 565.

Where a husband's alimony had been refused for some time, a motion for a decree refused was refused.

The decree of the Court, in the Chamber, must be a reality to the wife.

In fixing the proper grant of alimony, 10 Grant, 565; shown to the Court, 10 Grant, 565.

The testimony of the wife, whether given in the Chamber, 1 Cham. R. 194.

An order of the Court, in the Chamber, 1 Cham. R. 194.

Where, a few days after her departure from her husband's house, the wife was found with severe bruises and injuries upon her person, which in the opinion of a medical man, must have been caused by external physical violence not occasioned by a fall or other accident, and the husband having been shown to have used violence towards her on other occasions, and in other ways had so conducted himself as to raise a strong presumption that the bruises and injuries were inflicted by him, the court made a decree for alimony, *Jackson v. Jackson*, 8 Grant, 499.

The Court will in a proper case grant interim alimony *pendente lite*, *Soules v. Soules*, 3 Grant, 113.

As to the practice for obtaining interim alimony, see *Ord. 488 et seq.*

On a motion in Chambers for interim alimony it is not necessary to prove any of the allegations in the bill, except that of the marriage, *Nolan v. Nolan*, 1 Cham. R. 368; *Carr v. Carr*, 2 Cham. R. 71. The affidavit should state by whom and how the marriage was celebrated, giving such particulars as will show the Court that the parties are really married, *Taylor v. Taylor*, 1 Cham. R. 234.

Where interim alimony had not been applied for, the Court refused to carry the allowance for alimony back to a date beyond the time of making the decree, *Soules v. Soules*, 3 Grant, 113. In suits for alimony, the plaintiff, when she succeeds, is entitled, as a general rule, to her full costs of suit, *Ibid*; and even where, at the hearing, the bill was dismissed, the Court refused to dismiss the bill until the arrears of interim alimony, and costs taxed *de die in diem* had been paid by the defendant, *McKay v. McKay*, 6 Grant, 383.

Where the plaintiff in an alimony suit, after an order for interim alimony had been made, returned to her husband's house, and resided there for some time, but was afterwards obliged to leave by reason of cruelty, a motion to set aside the interim order on the ground of condonation was refused with costs, *Maxwell v. Maxwell*, 1 Cham. R. 27.

The defendant having signed a consent to an order being made directing him to pay the plaintiff a certain sum for alimony, on motion in Chambers for an order in terms of the consent; held, that the matter must be brought before the Court, as such an order would amount in reality to a decree in the cause, *Craig v. Craig*, 1 Cham. R. 41.

In fixing the amount of alimony to be paid, the husband's income is the proper guide, *Severn v. Severn*, 7 Grant, 109; *McCulloch v. McCulloch*, 10 Grant, 820; allowance increased from £25 to £200 per annum, it being shown that the husband's income had increased, *Severn v. Severn*, 7 Grant, 109.

The test for the allowance of costs in an alimony suit seems to be whether or not they have been vexatiously incurred, *Glennie v. Glennie* 1 Cham. R. 155.

An order or decree for alimony may now be registered against the lands of the defendant, 23 *Vic.*, c. 17, s. 4.

XXXI. In the case of Lunatics, Idiots and persons of unsound mind, and their Property and Estates, the jurisdiction of the Court shall include that which in England is conferred upon the Lord Chancellor by a Commission from the Crown, under the Sign Manual. 9 V. c. 10, s. 1.

As to the distinction between the jurisdiction exercised by the Lord Chancellor in Chancery and in Lunacy, see *Murray v. Frank*, 2 Dick. 555; *Sherwood v. Sanderson*, 19 Ves. 280.

There are according to Coke "four manners of non compos mentis," to whom the Royal Prerogative extends: 1. Idiot, or fool natural. 2. He who was of good and sound memory, and by the visitation of God has lost it. 3. Lunaticus qui gaudet lucidis intervallis, and sometimes is of good and sound memory, and sometimes non compos mentis. 4. He that is so by his own act as a drunkard, *Beverley's case*, 2 Co., pt. 4.

XXXII. The word "Lunatic" is used in the subsequent sections of this Act as including an Idiot or other person of unsound mind. 9 V. c. 10, s. 1.

The words "lunatic," "idiot," "unsound mind," are the legal terms usually introduced into modern Acts of Parliament to denote mental incapacity. The latter term is that which is most commonly used, as included in the expression "non compos mentis," and less open to objection than either of the other terms, *Ex parte Barnsley*, 3 Atk. 168; and see *Re McSherry*, 10 Grant, 390.

XXXIII. The Court may, on sufficient evidence, declare a person a lunatic without the delay or expense of issuing a Commission to inquire into the alleged lunacy, except in cases of reasonable doubt. 20 V. c. 56, s. 5.

The Court may now inquire into and determine the alleged lunacy, with or without the aid of a jury, but the alleged lunatic has a right to demand that the enquiry be submitted to a jury, 28 Vic. c. 17, s. 5; the enquiry must be confined to the question whether or not the person is, at the time of such enquiry, of unsound mind, and incapable of managing his affairs, *Ibid.*

The great object contemplated in all the proceedings is the promotion of the benefit and advantage of the particular individual, *Re Dyce Sombre*, 1 Mac. & G., 116; *Orenden v. Compton*, 2 Ves. 69.

There are cases in which the Court, in the exercise of its discretion, may consider that the proceedings would not tend to this end, though

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the mental infirmity may be such as fully to support them, *Lord Ward's case*, 2 M. & K., 54; *Brodie v. Barry*, 2 V. & B. 36; and there are others in which, from even a less degree of mental incapacity, it is necessary for the interests of the individual that he and his property should receive protection, *Gibson v. Jeyes*, 6 Ves. 267; *Ridgway v. Darwin*, 8 Ves. 66; *Re Holmes*, 4 Russ. 182.

Notice of the application must be served upon the alleged lunatic, and any Counsel or other person he may desire to see in relation to the matter must be allowed access to him, *Re Miller*, 1 Cham. R. 215; but notice may be dispensed with where service on the lunatic would be dangerous to him, *Re Patton*, 1 Cham. R. 192.

XXXIV. When a Commission has been issued and an inquisition thereupon returned into Court, by which a person is found Lunatic, in case any one entitled to traverse the inquisition desires to do so, he may within three months from the day of the return and filing of the inquisition, present a petition for that purpose to the Court, and the Court shall hear and determine the petition subject to the following provisions: 9 V. c. 10, s. 2.

1. In every order giving effect to such petition, the Court shall limit a time not exceeding six months from the date of the order, within which the person desiring to traverse, and all other proper parties, shall proceed to the trial of the traverse; but the Court may under the special circumstances of any case, and upon a petition being presented for that purpose, and upon the circumstances being substantiated upon affidavit, allow the traverse to be had or tried after the time limited; and in such special case, the Court may make such orders as seem just; 9 V. c. 10, s. 3.

2. The trial may be ordered to take place in any Court of Record in Upper Canada, or before a Judge of the Court of Chancery with the aid of a Jury, according to the circumstances of the case and the situation of the parties; 9 V. c. 10, s. 3—20 V. c. 56, s. 13.

3. The Court may order that the person to traverse, if he is not the party who has been found Lunatic, shall,

within one month after the date of the order, file with the Registrar of the Court a bond, with one or more sureties, in favor of the Registrar for the time being, and conditioned for all proper parties proceeding to the trial of the traverse within the time limited; such bond before the filing thereof being approved of and certified to be sufficient by the Judge of the County Court of the County in which the parties reside, or by one of the Judges or Masters of the Court of Chancery;

4. Every person who does not present his petition, or who neglects to give the security, or who does not proceed to the trial of the traverse, within the times respectively limited therefor, and the heirs, executors and administrators of every such person, and all others claiming through him, shall be absolutely barred of the right of traverse. 9 Vic. c. 10, s. 3.

As to the mode of proceeding, where the inquiry is had by the Court, with or without a jury, or before a Court of Record, see 28 Vic. c. 17 s. 5.

A finding of insanity under an inquisition may be traversed, but a finding of sanity cannot, *Hume v. Burton*, 1 Ridg. P. C. 813.

By the Common Law, where the King becomes seised of any estate of freehold or inheritance, by matter of record, whether judicial or ministerial, or by matter of fact found by office, the party aggrieved could have no traverse of the inquest, but he was put to his petition of right. The remedy by petition having been found inconvenient, the stat. 34 Edw. 3, c. 14, provided that in certain cases, after the return of the office in Chancery, the aggrieved party might traverse the office in Chancery, and the process was directed to be sent into the King's Bench to be tried according to law. By stat. 2 & 3. Edw. 6, it was provided, that if any person be untruly found lunatic or idiot, every person and persons aggrieved by such office or inquisition shall and may have his or their traverse to the same, immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisitions or offices found. This statute applies not to particular inquisitions only, but to all inquisitions, *Co. Litt.* 776; 12 *East*, 115.

A person traversing an inquisition is considered in the nature of a defendant opposing the title found for the Crown, and not in the nature of a plaintiff, *Regina v. Mason*, 2 Salk. 447; *Rex v. Roberts*, 2 Str. 1208,

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A traverse to the return of an inquisition finding a person a *non compos mentis* seems a right by law, though the Court is not dissatisfied with the return upon the evidence, *Ex parte Ferne*, 5 Ves. 832; *Ex parte Wragg*, 5 Ves. 450; *Ex parte Ward*, 6 Ves. 569; *Ex parte Cranmer*, 12 Ves. 445; *Sherwood v. Sanderson*, 19 Ves. 280.

A party having been found a lunatic under two inquisitions, the Court refused to allow him to traverse the second; but such inquisitions are not conclusive, and may be again questioned in actions at law or by suits in equity, *Ex parte Barnsley*, 3 Atk 184.

The alienage of a lunatic, or other person having a title to, or interest in, his land, may traverse an inquisition as well as the lunatic himself and a person who has entered into a contract with a *non compos* for the purchase of any portion of his property, is such an equitable alienage as will give him the right to traverse.

The Court may, upon petition, quash a commission of lunacy and the inquisition taken under it, without putting the party to the expense and delay of a traverse, *Re Milne*, 11 Grant, 153; but where the Judge who granted the commission thought a *prima facie* case of insanity made out, and the jury found the insanity, the Court, though quashing the inquisition, refused to charge the party applying for the commission with costs, *Ibid.*

XXXV. In case the Court declares a person a lunatic without issuing a Commission, any person who might traverse an inquisition to the same effect, may move against the order containing the declaration, or may appeal therefrom, as the case requires; and the right so to move or appeal shall as to time be subject to the same rules as the right to traverse. 20 V. c. 56, s. 5.

Any order in a matter of lunacy by a single Judge shall be subject to a hearing before the full Court, and any order of the full Court shall be subject to an appeal to the Court of Error and Appeal, 28 Vic. c. 17, s. 8.

XXXVI. In case the Court be dissatisfied with the verdict returned upon a traverse, the Court may order a new trial, or more than one new trial as in other cases. 9 V. c. 10, s. 4.

XXXVII. In order to afford due protection to the property of Lunatics, the following provisions shall in every case be observed: 9 V. c. 10, s. 5.

1. The Committee of the estate shall give two or more responsible persons as sureties, in double the amount of the personal estate, and of the annual rents and profits of the real estate, for duly accounting for the same once in every year, or oftener if required by the Court; and the security shall be taken by bond or recognizance in the name of the Registrar of the Court for the time being, in such manner as the Court or a Master thereof may direct, and the same shall be filed in the office of the Registrar;

2. The Committee of the estate shall, within six months after being appointed, file in the office of the Registrar a true inventory of the whole real and personal estate of the Lunatic, stating the income and profits thereof, and setting forth the debts, credits and effects of the Lunatic, so far as the same have come to the knowledge of the Committee;

3. If any property belonging to the estate be discovered after the filing of an inventory, the Committee shall file a true account of the same from time to time, as the same is discovered; and

4. Every inventory shall be verified by the oath of the Committee. 9 V. c. 10, s. 6.

Where the application is made to a Judge to declare a person a lunatic, it is now usual to have the name of the proposed Committee, affidavits of his fitness, and as to the amount of the lunatic's estate, submitted to the Judge before any order is drawn, and in such case the person is declared a lunatic, the Committee appointed and the amount in which he is to give security fixed, by the same order. This is done to avoid the delay and expense occasioned by a reference to a Master; but a reference is still sometimes ordered.

The Court cannot appoint a Committee of a lunatic on his giving his own security only, *Re Ward*, 2 Cham. R. 188; 3 U. C. L. J. N. S. 206; but where the personal estate of the lunatic consisted of a mortgage for a large amount which was over due, and the object in getting a committee appointed was to take proceedings to foreclose, the Committee was ordered to give security in double the annual income of the real estate, and double the amount likely to be realized from the personal estate, *Re Davis*, V. C. Mowat, 25th Feb., 1867.

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The Committee of the person does not give security, and will not be accepted as a surety for the Committee of the estate, *Re Burton, Ex parte Mount*, 21 L. J., Ch. 221.

As to the duties of the Committee of the person and estate, see *Elmer's Pr. 83, et seq.*

XXXVIII. Whenever the personal estate of a Lunatic is not sufficient for the discharge of his debts, the following steps may be taken: 9 V. c. 10, s. 7.

1. The Committee of his estate shall petition for authority to mortgage, lease or sell so much of the real estate as may be necessary for the payment of such debts;

2. Such petition shall set forth the particulars and amount of the estate real and personal of the Lunatic, the application made of any personal estate, and an account of the debts and demands against the estate;

3. The Court shall, by one of the Masters or otherwise, inquire into the truth of the representations made in the petition, and hear all parties interested in the real estate;

4. If it appears to the Court that the personal estate is not sufficient for the payment of debts, and that the same has been applied to that purpose as far as the circumstances of the case render proper, the Court may order the real estate or a sufficient portion of it to be mortgaged, leased or sold either by the Committee or otherwise;

5. The Court shall direct the Committee to discharge such debts, out of the money so raised, and the Court may order the Committee to execute conveyances of the estate, and to give security for the due application of the money, and to do such other acts as may be necessary in such manner as the Court may direct; and

6. In the application of any moneys so raised, the debts shall be paid in equal proportion without giving any preference to those which are secured by sealed instruments.

XXXIX. When the personal estate, and the rents, profits and income of the real estate of the Lunatic, are insufficient for his maintenance or that of his family, or for the education of his children, an application may be made by the Committee, or by any member of the family of the Lunatic, that the Committee be authorized or directed to mortgage or sell the whole or part of the real estate, as may be necessary; upon which the like reference and proceedings shall be had, and a like order made, as for payment of debts. 9 V. c. 10, s. 8.

XL. In case of any mortgage, lease or sale being made, the Lunatic and his heirs, next of kin, devisees, legatees, executors, administrators and assigns, shall have the like interest in the surplus which remains of the money raised as he or they would have in the estate, if no mortgage, lease or sale had been made; and such money shall be of the same nature and character as the estate mortgaged, leased or sold; and the Court may make such orders, as are necessary for the due application of the surplus. 9 V. c. 10, s. 9.

XLI. When a Lunatic is seised or possessed of real estate, by way of mortgage, or as a Trustee for others in any manner, the Committee may apply to the Court for authority to convey such real estate to the person entitled thereto, in such manner as the Court may direct; and thereupon the like proceedings shall be had as in the case of an application to sell the real estate; and the Court upon hearing all the parties interested may order a conveyance to be made; and on the application, by bill or petition, of any person entitled to a conveyance, the Committee may be compelled by the Court, after hearing all parties interested, to execute the conveyance. 9 V. c. 10, s. 10.

If the Mortgagor is desirous of paying off his mortgage he should give notice to the Committee.

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If the Mortgagor is satisfied with a vesting order under the Trustee Act, and does not require a re-conveyance, the most convenient course is for the Committee to obtain leave for him to pay in his money to the credit of the Lunacy, and then by petition, to obtain the vesting order. But if he requires a re-conveyance, it is the duty of the Committee, by petition, to obtain an order authorizing him on payment of the money into Court, to execute such re-conveyance.

The costs incurred in the lunacy are paid out of the Lunatic's estate, *Ex parte Richards, Re Lewis*, 1 J. & W. 264; and those of the re-conveyance by the Mortgagor. If the Mortgagor presents the petition he may have to pay all the costs, unless the Committee had refused to present it, *Re Wheeler*, 1 D. M. & G. 434. The petition by the Committee should not be served upon the Mortgagor, *Re Rowley*, 32 L. J. N. S. Ch. 158.

An *ad interim* Committee cannot receive, *Re Poulton*, 1 Mac. & G. 100.

XLII. Every conveyance, mortgage, lease and assurance made by the Committee under direction of the Court, pursuant to any of the provisions of this Act, shall be as valid as if executed by the Lunatic when of sound mind. 9 V. c. 10, s. 11.

XLIII. The Court may compel the specific performance of any contract made by a Lunatic while capable of contracting, and may direct the Committee to execute all necessary conveyances for the purpose; and the purchase money, or so much thereof as remains unpaid, shall be paid to the Committee or otherwise as the Court directs. 9 V. c. 10, s. 12.

XLIV. The Court may order any expenses and costs of and relating to the said petitions, orders, directions and conveyances to be paid and raised from the lands, rents or personal estate of the Lunatic, in respect of which the same were respectively made, in such manner as the Court thinks proper. 9 V. c. 10, s. 13.

XLV. In regard to the partition and sale of estates of joint tenants, tenants in common and coparceners, the Court shall possess the same jurisdiction as by the laws of England on the tenth of August, one thousand eight

hundred and fifty, was possessed by the Court of Chancery in England, and also as by the laws of Upper Canada is possessed by the Courts of Queen's Bench and Common Pleas or by the County Courts. 13, 14 V. c. 50, s. 4.

Where on the hearing of a cause for partition it was shewn that a division of the land would be less beneficial to the owners, than a sale, the Court without waiting for any return to that effect, ordered the lands to be sold, *Bennett v. Bennett*, 8 Grant, 446.

The fact that there is an outstanding term in lands to portions of which infants are entitled, is no defence to a bill of partition, although it may influence the Court in deciding between a sale or partition of the estate, *Fitzpatrick v. Wilson*, 12 Grant, 440.

In suits between joint owners for partition or sale, the costs are to be borne by the parties in proportion to their respective interests in the property, except that in the case of partition, the Court, if it sees fit, may give no costs to either party up to the hearing, *Cartwright v. Diehl*, 13 Grant, 380; *Bernard v. Jarvis*, 1 Cham. R. 24.

The costs in partition suits are, as in other suits, party and party costs; and where any of the parties are not *sui juris* costs as between solicitor and client, are not decreed even by consent, *Harkness v. Conway*, 13 Grant, 449.

Where a decree, which reserved no further directions, directed that a sale or partition of the property should take place according as the master should consider either course more for the interest of the parties, but contained no directions as to the conveyances or possession, or the execution of deeds, and the master reported in favour of partition; the Court on motion, ordered the execution of conveyances, and the delivery of possession, *O' Lons v. O' Lons*, 2 Grant, 642.

XLVI. In such cases, any Decree, Order or Report by which a partition or sale is declared or effected, or any Deed executed by the Master of the Court, to give effect to such partition or sale, shall have the same effect at law and in equity as the Record of a Return in the Court of Queen's Bench or Common Pleas or in the County Court has in matters of partition, or as Sheriff's Deeds now have in other cases. 13, 14 V. c. 50, s. 4.

XLVII. Any partition or sale made by the Court shall be as effectual for the apportioning or conveying away of

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the estate or interest of any married woman, infant or lunatic, party to the proceedings by which the sale or partition is made or declared, as of any person competent to act for himself. 13, 14 V. c. 50, s. 6.

XLVIII. An office copy of the Decree, Order or Report declaring a partition, shall be sufficient evidence in all Courts of the partition declared thereby, and of the several holdings by the parties of the shares thereby allotted to them. 13, 14 V. c. 50, s. 4.

XLIX. The Court shall also have jurisdiction respecting the custody of infants in the cases and subject to the provisions mentioned in the Statute relating to the custody of infants. 18 V. c. 126.

The Statute here mentioned is Con. Stat. U. C., c. 74.

L. When an infant is seised or possessed of or entitled to any real estate in fee, or for a term of years, or otherwise howsoever, in Upper Canada, and the Court is of opinion that a sale, lease or other disposition of the same or of any part thereof, is necessary or proper for the maintenance or education of the infant, or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by such disposition, the Court may order the sale, or the letting for a term of years, or other disposition of such real estate or any part thereof, to be made under the direction of the Court or one of its officers, or by the guardian of the infant, or by any person appointed by the Court for the purpose, in such manner and with such restrictions as to the Court may seem expedient, and may order the infant to convey the estate as the Court thinks proper. 12 V. c. 72, ss. 1, 2,—13, 14 V. c. 50, s. 8.

For the mode of proceeding under the provisions of this Act, see *Ord* 527, et seq.

In directing the sale of infants' real estate, the Court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit; the Court will order a sale of a portion of an infants' estate to save the rest when it is made to appear to be for the benefit of the infant, *Re McDonald*, 1 Cham. R., 97.

On applying for the sale of real estate settled upon infants, the mother by whom the application was made, was required to join in the conveyance for the purpose of surrendering the life interest vested in her under the settlement, *Re Kennedy*, 1 Cham. R., 97.

Where the estate of the infant is small, it is usual to advertise for tenders, to save the expense of a sale by auction, *Re Hansell*, 1 Cham. R. 189.

Where a reference is directed to a Master to enquire what would be a proper sum to allow for the maintenance and education of an infant, the order should not contain any authority for the payment, until the report is brought before the Court for approval, *Murphy v. Lamphier*, 12 Grant, 241.

Where a contract for the sale of an infants' estate had been approved of by the Court, it is not necessary for the purpose of obtaining a Decree for specific performance, to allege that the sale was a proper one under this Statute, *McDonald v. Garrett*, 8 Grant, 290.

On an application under this section for the sanction of the Court to a renewal of a lease made by the infant's ancestor, and containing a covenant for renewal none of the circumstances under which alone the Court is empowered to act, being alleged, an order was refused, *Re Jackes*, 3 U. C. L. J. N. S., 70; such an application can be made under the Imp. Act, 11 Geo. IV., & 1 Wm. IV. c. 65, s. 16, *Ibid*.

The guardian of an infant appointed by the Court, without the sanction of the Court, executed a lease for a term of years, during the existence of which the infant died, and an application having been made for the tenant to deliver up possession, he was ordered to do so, and on payment into Court of the arrears of rent, he was permitted to remove the buildings and erections put by him upon the property, doing no damage to the freehold, but the Court refused to make him any allowance out of the rents, for improvements made by him on the property, *Townesley v. Niel*, 10 Grant, 72.

LI. But no sale, lease or other disposition shall be made against the provisions of any will or conveyance by which the estate has been devised or granted to the infant or for his use. 12 V., c. 72, s. 2.

Where property was devised by a testator to his widow for the maintenance of his family, until the youngest child should come of age, and

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then to one of his sons charged with certain payments to his widow and the children, with a provision for the substitution of another son in the event of the devisee dying under age or without issue, it was held that the court had no jurisdiction to order a sale or mortgage of such property, and that such property was not the property of the infants within the meaning of the act, *Re Callicott*, 1 Cham. R. 182.

As to the power of the Court to order leases of infants' lands, unless the infant is indefeasibly seised in fee or in tail, in possession, see *Ex parte Evans*, 2 M. & K 318; *Ex parte Leigh*, 15 Sim. 445; *Re Clark*, 1 L. R. Ch. 292.

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LII. The application shall be in the name of the infant by his next friend, or by his guardian; but shall not be made without the consent of the infant if he is of the age of seven years or upwards. 12 V. c. 72, s. 1.

The petition is to be presented in the name of the infant, by his guardian, or by a person applying by the same petition to be appointed Guardian, *Ord.* 528; when the infant is above the age of seven years he is to be examined apart, upon the matter of the petition, and his consent thereto, and when he is under the age of seven, the fact is to be certified by the Judge or Master before whom he is produced, *Ord.* 532.

Where a petition is presented for the appointment of a guardian to an infant, the infant becomes a ward of court, *Stuart v. Marquis of Bute*, 9 H. L. 440; also where an order is made respecting the infant under the Trustee Relief Act, *Re Hodge*, 3 K. & J. 213, 218, but see *Re Hillary*, 2 Dr. & Sm. 461 as to the effect of the payment into court of money belonging to an infant.

LIII. Where the Court deems it convenient that a conveyance should be executed by some person in the place of the infant, the Court may direct some other person in the place of the infant, to convey the estate. 12 V. c. 72, s. 3.

LIV. Every such conveyance whether executed by the infant or some person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time. 12 V. c. 72, s. 3.

LV. The moneys arising from any such sale, lease or

other disposition, shall be laid out, applied and disposed of in such a manner as the Court directs. 12 V. c. 72, s. 4.

The rule is that money belonging to an infant is not ordered, in equity, to be paid to his guardian, whether appointed by the Surrogate Court or otherwise, but is secured for the benefit of the infant under the authority of the Court; but the rule may not apply where the amount is small and is required for the maintenance, education or other immediate use of the infant, or where some other special circumstances exist justifying an exception to the rule, *Mitchell v. Ritchie*, 13 Grant, 445.

But where the infant was resident in a foreign country, the Court directed money belonging to the infant to be invested for his benefit in the securities of such foreign country, *Sanborn v. Sanborn*, 11 Grant, 359.

An application to invest the money of an infant, pursuant to an order of Court, should be made by the infant, not by the person wishing to borrow, *Re Healey*, 1 Cham. R. 190.

LVI. On any sale or other disposition so made, the money raised, or the surplus thereof, shall be of the same nature and character as the estate sold or disposed of; and the heirs, next of kin, or other representatives of the infant, shall have the like interest in any surplus which may remain of the money at the decease of the infant, as they would have had in the estate sold or disposed of if no sale or other disposition had been made thereof. 12 V. c. 72, s. 5.

LVII. If any real estate of an infant is subject to dower, and the person entitled to dower consents in writing to accept in lieu of dower any gross sum which the Court thinks reasonable, or the permanent investment of a reasonable sum in such manner that the interest thereof be made payable to the person entitled to dower during her life, the Court may direct the payment of such sum in gross or the investment of such other sum, out of the proceeds of the sale of the Real Estate of the Infant. 12 V. c. 72, s. 6.

LVIII. Whereas the law of England was at an early

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period introduced into Upper Canada, and continued to be the rule of decision in all matters of controversy relative to property and civil rights, while at the same time, from the want of an equitable jurisdiction, until the fourth day of March, one thousand eight hundred and thirty-seven, it was not in the power of mortgagees to foreclose, and mortgagors out of possession were unable to avail themselves of their equity of redemption, and in consequence of the want of these remedies the rights of the respective parties, or of their heirs, executors, administrators or assigns, may be attended with peculiar equitable considerations, as well in regard to compensation for improvements, as in respect to the right to redeem, depending on the circumstances of each case, and a strict application of the rules established in England might be attended with injustice; the Court shall have authority in every case of mortgage, where, before the said fourth day of March, one thousand eight hundred and thirty-seven, the estate had become absolute in law, by failure in performing the condition, to make such decree in respect to foreclosure or redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators or assigns, as may appear to the Court just and reasonable under all the circumstances of the case, subject however to appeal by either party. 7 W. 4, c. 2, s. 11.

The Court of Chancery may under certain circumstances refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession, *Simpson v. Smyth*, 1 Error and Appeal, R. 172.

In cases of actual mortgage, that is where the proviso for redemption appears on the face of the instrument creating the incumbrance, the dormant equities act does not apply; but such cases are to be dealt with under the 11th clause of the original Chancery Act, *Hall v. Coldwell*, 8 U. C. L. J. 93.

The allowance for improvements is discretionary with the Court under

all the circumstances; where upon a reference to the Master to take the usual accounts under a decree for redemption, where the mortgage had become absolute before 1837, the Master had allowed the mortgagee in possession the price of certain valuable improvements, stating that he made such allowance solely under the provision of the statute, the Court on appeal referred the matter back to the Master, leaving it open to him to allow or disallow such improvements, *Harrison v. Jones*, 10 Grant, 99.

LIX. Whereas by the act to establish the Court of Chancery in Upper Canada, it was provided that the rules of decision in the said Court should be the same as governed the Court of Chancery in England; and whereas in regard to claims upon, or interests in real estate arising before the said date, it is just to restrict the future application of the said rules of decision to cases of fraud, and in regard to other cases, it is expedient to extend thereto in manner hereinafter provided, the authority so given to the court as aforesaid in case of mortgages: Therefore, no title to or interest in real estate which is valid at law, shall be disturbed or otherwise affected in Equity by reason of any matter or upon any ground which arose before the 4th day of March, A. D. 1837, or for the purpose of giving effect to any equitable claim, interest or estate, which arose before the said date, unless there has been actual and positive fraud in the party whose title is sought to be disturbed or affected. 18 V. c. 124, s. 1.

This section does not apply to cases of actual mortgage, where the proviso for redemption appears on the face of the instrument creating the incumbrance; such cases are to be dealt with under section 11 of the original Chancery Act, *Hull v. Coldwell*, 8 U. C. L. J. 93.

It was held by the Court of Chancery that express trusts are not within the statute relating to Dormant Equities, *Atty. Gen. v. Grassett*, 6 Grant, 485; but the Court of Appeal has decided that the act applies as well to express trusts, as to trusts created by implication of law, *Wragg v. Beckett*, 7 Grant, 220; *quare* whether the act applies to every case of express trust, or whether a case of express trust so direct and plain might not arise, that the Court would feel authorised to hold that the statute does not extend to it, though no exception of express trusts is contained in the Act, *Atty. Gen. v. Grassett*, (in appeal) 8 Grant, 130.

In *Arnold v. Chancery*, the Court which had title of the passing of had been that it was dormant to his legal

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In *Arner v. McKenna*, 9 Grant, 226, the three Judges of the Court of Chancery decided, [1] that notwithstanding the Dormant Equities act, the Court would grant relief in the case of an equitable title to land which had been embraced in a conveyance by mistake, where the legal title of the grantee under such conveyance was not asserted before the passing of the Chancery Act, and where the equitable title of the grantor had been asserted by possession after the passing of that Act; and [2] that it was an actual fraud within the meaning of the exception in the dormant equities act, for the grantor under the circumstances to assert his legal title.

In *Mulloch v. Pinhey*, 9 Grant, 550, the first point decided in *Arner v. McKenna*, was decided in the same way by V. C. Esten, in favor of a plaintiff who filed a bill to have an absolute deed made before the passing of the Chancery Act declared a mortgage, and for redemption, where the defeasible nature of the title had been admitted, and no absolute title had been asserted till long after the passing of that act. The V. C. also expressed his opinion that the decision in *Hall v. Coldwell* applied to this case, though this point was not determined.

In *Tiffany v. Thompson*, 9 Grant, 244, Vankoughnet, C., said, "In my opinion the Dormant Equities Act does not apply to a case of express trust, for breach of which the *cestui que trust* seeks redress against the trustee, and in the case of such a trust as the present, in which the trustee is called to account, it can form no defence to him. I think the rule of construction should be that the act does not apply as between trustee and *cestui que trustent* to the cases of such trust, but that exceptional cases arising upon such trusts may find protection under it. I agree with what has been so well said by the late Chancellor, and V. C. Spragge in *Wragg v. Beckett*, upon the question which I do not understand to be settled by any judgment of the Court of Appeal."

LX. In regard to any other equitable claim or right which may have arisen before said date, the Court shall have authority (subject to appeal) to make such Decree as may appear to the Court just and reasonable, under all the circumstances of the particular case, provided that the suit be brought within twenty years from the time when the right or claim arose; and no further time shall be allowed for bringing any such suit, notwithstanding any disability of the claimant or of any one through whom his right accrued. 18 V. c. 124, s. 2.

The Dormant Equities Act applies only to cases which arose before the passing of the act, *Silcox v. Sells*, 6 Grant, 237.

LXI. The Court shall have jurisdiction to entertain appeals, by either party against any Order or Decree made by the Judge of a County Court under the equitable jurisdiction thereof, and the Court of Chancery shall make such Order thereupon in respect to costs or otherwise, or for referring back the matter to the Judge before whom the same was first heard, as may be just and proper. 16 V. c. 119, s 18.

Injunctions to restrain the committing of waste or trespass to property by unlawfully cutting, destroying or removing trees or timber, may be granted by the Judge of any County Court, and such injunctions shall only remain in force for a period of one month, unless sooner dissolved on an application to the Court of Chancery; but the power to grant such injunctions shall not authorize the prosecuting of the suit in the County Court, and the injunction may be extended and the suit further prosecuted to judgment or otherwise in the Superior Court in the like manner as if the same had originated in that Court, *Con. Stat. U. C., c. 15, s. 35.*

A defendant moving to dissolve an injunction issued from a County Court, is not bound to have the proceedings returned from the County Court office, *Abraham v. Shepherd*, 4 Grant, 260; but, where the plaintiff moves to extend an injunction issued in a County Court, it is his duty to have the papers transmitted before the motion is heard, *Stevenson v. Huffman*, 4 Grant, 318.

Any claim entered on the Equity side of a County Court may be removed by either party into the Court of Chancery by order of that Court, to be obtained on a summary application by motion or petition supported by affidavit, of which reasonable notice shall be given to the opposite party, and the order shall be made on such terms as to payment of costs, or upon such other terms as to the Court of Chancery may seem just; but no claim shall be removed, unless the Court of Chancery be of opinion that the nature of the claim renders it a proper one to be withdrawn from the jurisdiction of the County Court, and disposed of in the Court of Chancery, and the said Court of Chancery shall make the necessary regulations for the practice to be observed in proceedings under this section, *Con. Stat. U. C., c. 15, s. 57.*

A suit in the County Court can be removed into the Court of Chancery only when the suit is one in which the County Court has jurisdiction; so where on an application to remove the suit it appeared that the County Court had no jurisdiction to entertain it, the application was refused, *Martin v. Mitchell*, 1 Cham. R. 384.

As to what suits may be brought on the equity side of the County Court, see *Con. Stat. U. C. c. 15, s. 34.*

When a mortgage costs, the in which the Chancery, obtaining a bill the defendant 9 Grant, 37 v. *Millar*, 12 exceeding a sequent in 202; *Seath*

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When a plaintiff filed his bill in the Court of Chancery to foreclose a mortgage within the jurisdiction of the County Court, he was refused his costs, the fact that the defendant is resident in another County than that in which the land is situate being no reason for resorting to the Court of Chancery, *Connell v. Curran*, 1 Cham. R. 11; but the necessity for obtaining an order for substitutional service is a sufficient reason for filing a bill in Chancery, *Seath v. Mellroy*, 2 Cham. R. 93; or where the defendant is resident out of the jurisdiction, *Lawrason v. Fitzgerald*, 9 Grant, 371; or where the defendants live in different Counties, *McLeod v. Millar*, 12 Grant, 194. Where the bill is filed in respect of a demand, not exceeding £50, the plaintiff should proceed in Chancery, if there is a subsequent incumbrance exceeding that sum, *Hyman v. Roots*, 11 Grant, 202; *Seath v. Mellroy*, 2 Cham. R. 93.

LXII. The Court shall also have jurisdiction on any appeal from the judgment or decision of the Commissioners under the Act for the protection of the lands of the Crown in Upper Canada, except as in the said Act is otherwise provided; and the Court may alter, affirm or annul, the decision of the Commissioners, or order further inquiry to be made, or direct an issue touching the matter in dispute, to be tried at law or before the Court or a Judge thereof with the assistance of a Jury, and may make such orders and directions therein for payment of costs, and other matters respecting the same, as to the Court seem just; and the decree of the Court shall be conclusive on the party appealing, as well as on the Commissioners. 2 V. c. 15, s. 11.

LXIII. In every case in which the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may make an order or a decree vesting such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order or decree shall have the same effect both at Law and in Equity as if the legal or other estate or interest in the property had been actually con-

veyed, by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested, or in the case of a *chose in action*, as if such *chose in action* had been actually assigned to such last mentioned person. 20 V. c. 56, s. 8.

The Court can make a vesting order in those cases only in which it has authority to order the execution of a deed, conveyance, transfer or assignment of any property. So where the plaintiff in a mortgage suit for sale has leave to bid, and becomes the purchaser, the Court cannot make an order vesting the property in him, inasmuch as he is the person who, in the event of a third person having become the purchaser, would have had to execute the conveyance; the mortgagor or his heirs not being proper parties to such a conveyance, *Ross v. Steele*, 1 Cham. R. 94; *Re Williams*, 21 L. J., N. S., Ch. 437; *Bowen v. Fox*, 1 Cham. R. 387.

A party purchasing under a decree of the Court, has a right to call for evidence, shewing that persons whose interests were intended to be disposed of, were alive at the time of such sale, before accepting title by means of a vesting order, *Slater v. Fiske*, 1 Cham. R. 1.

LXIV. The filing of a bill or the taking of a proceeding, in which bill or proceeding any title or interest in land is brought in question, shall not be deemed notice of the bill or proceeding to any person not being a party thereto, until a certificate by the Registrar or a Deputy Registrar of the Court, in the form mentioned in this section, has been registered in the Registry Office of the County in which the land is situate:—

“I certify that in a suit or proceeding in Chancery between A. B. and C. D., some title or interest is called in question in the following land (*describing it*).”

But no certificate is required to be registered of a suit or proceeding for the foreclosure of a registered mortgage. 18 V. c. 127, s. 3. 20 V. c. 56, s. 9.

The form of certificate given in the recent Registry Act, 31 Vic. c. 20, s. 57, differs from the above in requiring the addresses of the parties to the suit to be given.

Where a certificate of *lis pendens* has been registered, and the bill is afterwards dismissed, it is not necessary to obtain an order discharging

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the certificate from the registry, the registration of the decree dismissing the bill being sufficient for all purposes, *Dealer v. Cosford*, 1 Cham. R. 22.

LXV. Every decree affecting land may be registered in the Registry Office of the County where the land is situate, on a certificate by the Registrar or a Deputy Registrar of the Court, setting forth the substance and effect of the decree, and the land affected thereby. 18 V. c. 127, s. 4.

No judgment, rule, order or decree for the payment of money in any Court in Upper Canada shall create or operate as a lien or charge upon lands or any interest therein, 24 Vic. c. 41, s. 10.

A decree for alimony may be registered so as to bind the lands of the defendant, 28 Vic. c. 17, s. 4.

[Sections 66, 67 & 68 were repealed by 24 Vic. c. 41, s. 1.]

LXIX. In any case in which the Court requires an issue to be tried by a jury, it shall not be necessary to commence any feigned action in a Court of Law; but upon an office copy of the decree or order directing the trial of the issue, being entered for trial in the same manner as a *Nisi Prius* record is entered, the issue shall be tried at the Assizes, or at the sittings of a County Court in Upper Canada, in the same manner as issues are tried in actions brought in the Superior Courts of Law or in the County Courts, and the finding of the jury shall be endorsed upon such office copy and signed by the presiding Judge, and the office copy shall then be transmitted to the Registrar of the Court of Chancery; or instead of directing an issue to be tried at law, the Court may try the same by a jury without the intervention of a Court of Common Law, and may issue a precept or order directed to the Sheriff of any County the Court sees fit, requiring him to strike and summon a Jury for that purpose; and at the trial, one Judge or more of the Court of Chancery may sit or preside. 20 V. c. 56, s. 13.

The order directing the issue specifies the question or questions of fact

to be submitted to the jury, and it usually provides that the parties are to be at liberty to read the depositions taken in the cause, of any witness who may be dead, or incapable of attending the trial, *Palmer v. Lord Aylesbury*, 15 Ves. 176; *Watkins v. Aitchison*, 10 Hare. app. 46.

The order also directs at what assizes the issue is to be tried, and reserves further directions, or adjourns the further hearing until after the trial.

A party to an issue is not, by going to trial, precluded from appealing against the order directing the issue, *Bullin v. Masters*, 2 Phil. 290; *Parker v. Morrell*, 12 Jur., 253.

When the plaintiff neglects to proceed to trial of the issue, the opposite party should move upon notice, that the plaintiff may proceed to trial at the next assizes, or in default that the issue may be taken *pro confesso*, *Casborne v. Barsham*, 5 M. & C. 113, and where the defendant in the suit, is made plaintiff in the issue the plaintiff may make the like motion, *Hartland v. Dancocks*, 5 De G. & S., 561. But the Court will not adopt this course under particular circumstances, or where material witnesses were unable to attend at the trial, *Hargrave v. Hargrave*, 8 Beav. 289; or where by mistake the plaintiff has neglected to give notice of trial in time, *Varty v. Duncan*, 11 Jur. 809; and see *Reeve v. Hodson*, 17 Jur. 344.

If any of the parties are dissatisfied with the verdict, they may apply for a new trial, the motion for which is made to the Court of Chancery, and not to the Court of Law, *Bootle v. Blundell* 19 Ves. 494. Under special circumstances the Court has directed a third trial of an issue, *Hargrave v. Hargrave*, 13 Jur. 463. As to the principles which guide the Court in granting a new trial upon the ground of misdirection, see *Bennett v. Duke of Manchester*, 2 W. R. 644; S. C. 23 L. T. 331.

The general rule with respect to the costs of an issue is that they follow the event, and are given to the party who prevails at law, *Rochester v. Lee*, 2 D. M. & G. 427; but this is liable to exceptions. The costs of an issue directed on an interlocutory application may be disposed of after the issue is decided, without waiting for the hearing, *Duncan v. Varty* 2 Phil. 696.

Trial by Jury in Chancery will not generally be directed where either party desires a trial at law, *Peters v. Rule*, 7 W. R. 171 and cannot be directed, except at a stage of the suit, and in circumstances in which it has been the practice to direct an issue, *Bradley v. Bevington*, 4 Drew. 511; 5 Jur. N. S. 562.

The Court will not direct a trial before it, on an opposed application for the purpose, before the hearing; where it is clear the question is proper for such trial, the parties should agree to the application, to save the expense of taking the evidence twice, *George v. Whitmore*, 26 Beav. 557.

LXX. In any suit instituted in the Court of Chancery by a mortgagee or judgment creditor, or by any other per-

son having a claim in respect of or sale of real estate, or as creditor of the person, or in respect of service of the person, shall be at liberty to move whether or not a copy of the bill is in the hands of the recoverer, or may elect to proceed instead of

This section applies to the Chancellor, and to the Court of Chancery.

When a bill is filed, the attorney at law for the plaintiff may be given, and the motion may be made.

In moving for judgment, the plaintiff must state the facts, and state the law, and state the relief sought, and state the relief sought, and state the relief sought.

LXX. In any suit instituted in the Court of Chancery by a mortgagee or judgment creditor, or by any other person having a claim in respect of or sale of real estate, or as creditor of the person, or in respect of service of the person, shall be at liberty to move whether or not a copy of the bill is in the hands of the recoverer, or may elect to proceed instead of

In practice, the Court will not direct a trial before it, on an opposed application for the purpose, before the hearing; where it is clear the question is proper for such trial, the parties should agree to the application, to save the expense of taking the evidence twice, *George v. Whitmore*, 26 Beav. 557.

son having a charge on real property, for the foreclosure or sale of property, and to which suit any judgment creditor of the mortgagor or of the judgment debtor, or of the person liable to the charge, is a defendant, personal service on such defendant shall not be necessary, and it shall be sufficient to serve the process of the Court, whether the same be an office copy of the bill or an office copy of the decree or decretal order, upon his Attorney in the action at Law in which the judgment has been recovered; but the plaintiff in any such suit in Chancery may elect to serve the judgment creditor personally instead of serving the Attorney. 20 V. c. 56, s. 14.

This section applies only to cases of foreclosure or sale by an incumbrancer, *Munro v. Keiley*, 1 Cham. R. 23.

When under this section an office copy of the bill is served upon the attorney at law, the seven days notice of motion required by Ord. 107, must be given, before the bill can be taken *pro confesso*; but the notice of motion may be served on the attorney, *Webster v. O'Closter*, 6 Grant, 278.

In moving for an order *pro confesso* after service upon the attorney of a judgment creditor, the affidavit of service must follow the words of the act, and shew that the party served appears as the attorney of the creditor on the roll of the judgment in respect of which he is made a party to the suit, *Cameron v. Phipps*, 1 Cham. R. 4.

LXXI. An absent defendant may be served at any place out of the jurisdiction of the Court, with a copy of any bill or proceeding, without an application being previously made to the Court for the allowance of such service, and the service shall be allowed on proof to the satisfaction of the Court that the same was duly made. 20 V. c. 56, s. 15.

In practice this section was never acted upon until recently, as the Court would not upon default of answer, grant an order *pro confesso*, until an order limiting the time within which the defendant was to answer had been obtained, and had been served personally upon him; and this even although the endorsement upon the office copy of the bill required by Ord. 86, had been altered so as to give the defendant the same time for answering, as the Court would give by the order authorizing service of the bill out of the jurisdiction.

The necessity for obtaining an order giving leave to serve out of the jurisdiction is now done away with, and the time within which a defendant is to answer, according to the distance of the place where served, is regulated by a general order, *Ord.* 90

The powers of the Court as to serving absent defendants have been further extended by 28 Vic. c. 17, s. 12.

LXXII. All moneys that become subject to the control and distribution of the Court, shall be paid in the name of the Accountant General of the Court into the hands of such person or body corporate, or be vested in the name of the Accountant General in the public funds of the province, or in such other securities, as the Court from time to time directs, and all interest arising from the sums so deposited or vested, shall be added to the principal sum, and be distributed therewith to the persons entitled to receive the same. 7 W. 4, c. 2, s. 7.

LXXIII. A fee of ten cents shall be paid to the Registrar or Deputy Registrar, on the filing of every bill and of every answer or demurrer, in addition to other fees and charges thereon; and such fee shall be paid in to an account to be called "The Suitors' Fee Fund Account," which account shall be kept and managed as may from time to time be directed by the Court, and the sums, at the credit of such account, shall be applied by the Court as may be necessary for the protection of infants and other persons not *sui juris* on whose behalf proceedings may be had in the Court, or may, by the Court, be ordered to be had in other Courts. 20 V. c. 56, s. 20.

By 28 Vic. c. 17, s. 10, this section is amended by inserting the words "or *non compos mentis*," immediately after the words *sui juris*.

LXXIV. All general orders of the Court existing when this Act takes effect are hereby confirmed and declared to be as effectual as if the same were hereby specially enacted; but the same may, from time to time, be suspended, repealed, varied and re-enacted by the Court,

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and shall, in all respects be subject to the control and direction of the Court and the respective Judges thereof, as in the case of any other general orders which the Court is empowered to make under the general or other jurisdiction thereof. 20 V. c. 56, s. 21. 12 V. c. 64, s. 9.

LXXV. The Court may, from time to time, make such general orders as to the Court may seem expedient, for regulating the Offices of the Masters and Registrars, and for regulating and securing the due performance of the duties of all the Officers of the Court, and for regulating and adapting to the circumstances of this Province, the practice and proceedings of the Court, and more especially the nature and form of the process and pleadings, the taking, publishing, using and hearing of testimony, the examination of the parties to a suit upon their oaths, *viva voce* or otherwise, the allowance and amount of costs and every other matter deemed expedient for better attaining the ends of Justice, and advancing the remedies of Suitors; and the Court may, from time to time, suspend, repeal, vary or revive any such orders, but no such order shall have the effect of altering the principles or rules of decision of the Court. 12 V. c. 64, s. 11. See c. 72, s. 7,—7 W. 4, c. 2, s. 4,—20 V. c. 56, s. 21.

LXXVI. All gaols in Upper Canada shall be prisons for the Court. 7 W. 4, c. 2, s. 14,—9 V. c. 10, s. 14.

CON. STAT. U. C. CAP. XVI.—AN ACT RESPECT-
ING THE SURROGATE COURTS.

SS. XXVI.—XXXI., XLII.—XLV.

XXVI. Any person considering himself aggrieved by any order, sentence, judgment or decree of any Surrogate Court, or being dissatisfied with the determination of the

Judge thereof in point of law in any matter or cause under this Act, may, within fifteen days next after such order, sentence, judgment, decree or determination, appeal therefrom to the Court of Chancery, in such manner and subject to such regulations as may be provided for by the rules and orders made under the Surrogate Courts Act, 1858, or under this Act, and the said Court of Chancery shall hear and determine such appeals; but no such appeal shall be had or lie unless the value of the goods, chattels, rights or credits to be affected by such order, sentence, judgment, decree or determination, exceeds two hundred dollars. 22 V. c. 93, s. 20.

XXVII. In every case in which there is contention as to the grant of Probate or Administration, and the parties in such case thereto agree, such contention shall be referred to and determined by either of Her Majesty's Superior Courts of Law or by the Court of Chancery, on a case to be prepared, and the Surrogate Court having jurisdiction in such matter shall not grant Probate or Administration until such contention be terminated and disposed of by judgment, decree or otherwise. 22 V. c. 93, s. 21.

XXVIII. Any cause or proceeding in the said Surrogate Courts in which any contention arises as to the grant of Probate or Administration, or in which any disputed question may be raised (as to law or facts), relating to matters and causes testamentary, shall be removable by any party to such cause or proceeding into the Court of Chancery by order of a Judge of the said Court to be obtained on a summary application supported by affidavit, of which reasonable notice shall be given to the other parties concerned. 22 V. c. 93, s. 22.

Where the controversy was as to the validity of the will, and the sworn allegation was, that "the questions to be tried and determined are of such importance and difficulty that the deponent believes the same can be more

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effectually tried and disposed of in this Court than in the Surrogate Court," the Court in the absence of any counter affidavit, ordered the removal of the case, *Re Eccles*, 1 Oham. R. 376; to justify the removal of a cause there must be some disputed question of law or fact, a contest who should be administrator and the delay occasioned thereby, is not a sufficient reason, *Re Beckwith*, 5 U. C. L. J. 256.

As to costs where order for removal made, *Re Lee & Waterhouse*, 5 U. C. L. J. 256.

XXIX. The Judge making such order may impose such terms as to payment or security for costs or otherwise as to him may seem fit; but no case or proceeding shall be so removed unless it be of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the Surrogate Court and disposed of by the Court of Chancery, nor unless the personal estate of the deceased exceeds two thousand dollars in value. 22 V. c. 93, s. 22.

XXX. Upon any cause or proceeding being so removed as aforesaid, the Court of Chancery shall have full power to determine the same, and may cause any question of fact arising therein to be tried by a jury and otherwise deal with the same as with any cause or claim originally entered in the said Court of Chancery; and the final order or decree made by the said Court of Chancery in any cause or proceeding removed as aforesaid, shall, for the guidance of the said Surrogate Court, be transmitted by the Surrogate Clerk to the Registrar of the Surrogate Court from which such cause or proceeding was removed. 22 V. c. 93, s. 22.

XXXI. There shall be a Clerk appointed to be called the Surrogate Clerk, who shall perform the duties required of the Surrogate Clerk by this Act, as well as the duties that by the rules and orders made as hereinbefore mentioned may be required of such Surrogate Clerk, and also such other duties as may be required of him by the Court of Chancery, and such Surrogate Clerk shall be deemed

an officer of the said Court of Chancery, and be paid a fixed salary not exceeding one thousand six hundred dollars yearly, and the Governor shall from time to time appoint and at his pleasure remove such Clerk. 22 V. c. 93, s. 23.

XLII. In case it appears by the certificate of the Surrogate Clerk that application for Probate or Administration has been made to two or more Surrogate Courts, the Judges of such Courts respectively shall stay proceedings therein, leaving the parties to apply to one of the Judges of the said Court of Chancery to give such direction in the matter as to him may seem necessary. 22 V. c. 93, s. 28.

XLIII. On application made to any one of such Judges, he shall enquire into the matter in a summary way, and adjudge and determine what Surrogate Court has jurisdiction, and shall proceed in the matter. 22 V. c. 93, s. 28.

XLIV. The Judge of the Court of Chancery may order costs to be paid by any of the applicants, and the order shall be enforced by the Court of Chancery. 22 V. c. 93, s. 28.

XLV. The determination of such Judge shall be final and conclusive, and as soon as may be after such determination made, the Surrogate Clerk shall transmit a certified copy thereof to the Registrars of the several Surrogate Courts wherein such applications as aforesaid have been made. 22 V. c. 93, s. 28.

CON. STAT. U. C., CAP. XXIV.—AN ACT RESPECTING ARREST AND IMPRISONMENT FOR DEBT.

SS. VIII—XI, XIII—XVI, XIX—XXIII, XLI.

VIII. The Writ of *Ne exeat Provincia* shall be called

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a Writ of Arrest, and no order shall be granted for a Writ of Arrest unless the party applying for the writ has a cause of suit to at least such an amount, and shews by affidavit such facts and circumstances, as this Act requires in the case of a special order for holding a party to bail under the fifth section of this Act. 22 V. c. 33, s. 1.

The fifth section of this Act, which relates to applications to hold to bail at Common Law, requires an affidavit shewing that the party applying has a cause of action to the amount of \$100 or upwards, and shewing such facts and circumstances as satisfy the Judge that there is good and probable cause for believing that the defendant is about to quit Canada with intent to defraud his creditors generally or the plaintiff in particular.

As to setting aside a writ of arrest, see *Anderson v. Stamp*, 11 Jur. N. S. 169; *Macpherson v. Macpherson*, 2 Cham. R. 222.

IX. In suits for alimony, instituted after this Act takes effect, the Court or a Judge thereof may, in a proper case, order a Writ of Arrest to issue at any time after the bill has been filled, and shall, in the order, fix the amount of bail to be given by the defendant, in order to procure his discharge. 20 V. c. 56, s. 3.

X. In case an order is made for a Writ of Arrest, in a suit for alimony, the amount of the bail required shall not exceed what may be considered sufficient to cover the amount of future alimony for two years, besides arrears and costs, but may be for less at the discretion of the Court. 22 V. c. 33, s. 2.

XI. The bail or security required to be taken under a "Writ of Arrest" shall not be that the person arrested will not go or attempt to go out of Upper Canada, but shall merely be to the effect that the person arrested will perform and abide by the orders and decrees made or to be made in the suit, or will personally appear for the purposes of the suit at such times and places as the Court may from time to time order, and will, in case he

becomes liable by law to be committed to close custody, render himself (if so ordered), into the custody of any Sheriff the Court may from time to time direct. 22 V. c. 33, s. 3.

The bail of a defendant who has been arrested under a writ of *ne exeat*, cannot be discharged from their bonds upon the defendant rendering himself to the custody of the Sheriff, *McDonald v. McDonald*, 1 Cham. R. 22.

XIII. Process of contempt for non-payment of any sum of money, or for non-payment of any costs, charges or expenses, payable by any decree or order of the Court of Chancery or of a Judge thereof, or by any rule or order of the Court of Queen's Bench or Common Pleas or of a Judge thereof, or by any decree, order or rule of a County Court or of a Judge thereof, is abolished; and no person shall be detained, arrested or held to bail for non-payment of money, unless a special order for the purpose be made on an affidavit or affidavits establishing the same facts and circumstances as are necessary for an order for a Writ of *Capias ad Satisfaciendum*, under this Act; and in such case the arrest when allowed shall be made by means of a Writ of Attachment corresponding as nearly as may be to a Writ of *Capias ad Satisfaciendum*. 22 V. c. 33, s. 4

The court will not detain a person in gaol merely for the non-payment of money; but in order to punish any one who has been guilty of a contempt of Court, it may imprison him for a stated period, allowing him to be discharged if he pay the costs of his contempt before the expiration of such period, *Harris v. Meyers*, 1 Cham. R. 229.

An attachment to commit a party for contempt will not be granted merely for non-payment of the costs of the contempt, *Dickson v. Cook*, 1 Cham. R. 210; nor will the Court order a commitment for disobeying a decree, where the disobedience is in effect the non-payment of money, *Male v. Boucher*, 1 Cham. R. 359.

XIV. But in case a party be arrested under a Writ of Arrest, it shall not be necessary before suing out a writ under the preceding section of this Act to obtain a

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Judge's order therefor, or to file any further affidavit than the affidavits on which the order for the Writ of Arrest was obtained. 22 V. c. 33, s. 5.

XV. Every decree or order of the Court of Chancery, and every rule or order of the Court of Queen's Bench or Common Pleas, and every decree, order or rule of a County Court, directing payment of money or of costs, charges or expenses, shall, so far as it relates to such money, costs, charges or expenses, be deemed a judgment, and the person to receive payment a creditor, and the person to make payment a debtor, within the meaning of this Act; and the said persons shall respectively have the same remedies, and the Courts and Judges and the officers of Justice shall in such cases have the same powers and duties, as in corresponding cases under this Act. 22 V. c. 33, s. 14.

XVI. In case a person has been heretofore, or may after this Act takes effect, be arrested and committed to gaol in any other County than that in which he resided or carried on business at the time, such person shall be entitled to be transferred to the gaol of his own County on prepaying the expense of his removal; and the Sheriff in whose County he was arrested may, if he be satisfied of the facts, transfer him accordingly; but if the Sheriff declines to act without an order of the Court or a Judge, such an order shall be made on the application of the prisoner and notice to the opposite party. 22 V. c. 33, s. 9.

XIX. For the purpose of enforcing payment of any money or of any costs, charges or expenses payable by any decree or order of the Court of Chancery, or any rule or order of the Court of Queen's Bench or Common Pleas, or any decree, order or rule of a County Court, the person to receive payment shall be entitled to Writs of *Fieri Facias* and *Venditioni Exponas* respectively,

against the property of the person to pay, and shall also be entitled to attach and enforce payment of the debts of or accruing to the person to pay, in the same manner respectively and subject to the same rules, as nearly as may be, as in the case of a judgment at law in a civil action; and such writs shall have the like effect as nearly as may be, and the Courts and Judges shall have the same powers and duties in respect to the same and in respect to the proceedings under the same, and the parties and Sheriff respectively shall have the same rights and remedies in respect thereof, and the writs shall be executed in the same manner and subject to the same conditions, as nearly as may be, as in the case of like writs in other cases; but subject to such general orders and rules varying or otherwise affecting the practice in regard to the said matters, as the Courts respectively may from time to time make under their authority in that behalf. 22 V. c. 33, s. 12.

Where a *fi. fa.* for costs was issued as soon as the taxation was completed, and placed in the Sheriff's hands, without allowing the solicitor whose client had to pay the costs a reasonable time to communicate the result of the taxation, the writ was set aside with costs, *Cullen v. Cullen*, 2 Cham. R. 94; *Jones v. Bank of Upper Canada*, V. O. Mowat, 8th October, 1867; and see *Perkins v. The National Assurance and Investment Association*, 2 H. & N. 71; *Cruickshank v. Moss*, 8 L. T. N. S. 439; *Henry v. The Commercial Bank of Canada*, 17 U. C. Q. B. 104.

Where the Sheriff made a mistake in his return to a *fi. fa.*, an amendment was allowed on payment of costs, *McCann v. Eastwood*, 2 Cham. R. 182; *The King v. the Sheriff of Monmouth*, 1 Marsh. 344.

The Court will make an order for the examination of a defendant to ascertain what debts are due to him, with a view of garnishing such debts under this section, *Bostwick v. Shortis*, 1 Cham. R. 69.

Where an application is made to compel a garnishee to pay over to the creditor, debts due by him to the debtor, which have been garnished, notice must be served on the garnishee, *Re English*, 1 Cham. R. 197.

A creditor applying for a garnishing order is entitled to the costs of the application, *Evans v. Evans*, (on appeal), 1 Cham. R. 303.

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be attached to answer a debt due from him in his private capacity, *Bowman v. Bowman*, 1 Cham. R. 172.

An award for an amount together with costs having been made in favour of a party, the costs were taxed by consent, and the amount promised to be paid to the solicitor of the party ordered to receive such costs. A garnishing order was subsequently obtained by a third party, under which the amount awarded and the costs were paid over to such third party, with notice, however, of the solicitor's lien for the costs. Under these circumstances, a motion made to stay proceedings to enforce payment of the costs under the award at the instance of the solicitor, to whom they were payable, was refused with costs, *McLean v. Beatty*, 1 Cham. R. 138.

XX. In case a decree or order in Chancery, or of a County Court in the exercise of the equitable jurisdiction of such County Court, directs the payment of money into Court or to the credit of any cause, or otherwise than to any person, the person having the carriage of the decree or order, so far as relates to such payment, shall be deemed the plaintiff within the meaning of this Act. 22 V. c. 33, s. 15.

XXI. The Court of Chancery may also issue Writs of Sequestration as hitherto or in such cases as by general or other orders the Court may think expedient; and nothing in this Act shall be construed to take away the jurisdiction of the Court under or by means of such writs; and no writ shall issue from Chancery against the lands of the person to pay, but if the decree or order be registered, the Court may enforce the charge thereby created upon real estate, according to the practice of the Court in the case of a charge on real estate created by other means. 22 V. c. 33, s. 13.

The latter part of this section, commencing with the words, "and no writ shall issue" has been repealed by 24 V. c. 41, s. 4.

A writ of sequestration cannot be issued upon precipe; before the writ can issue, the order for the payment of the money, must be served and an affidavit of the service and non-payment of the money filed, *Fisken v. Wride*, 2 Cham. R. 212.

Decrees or orders for the payment of alimony may be registered, 28 V. c. 17, s. 4.

XXII. For the purpose of carrying out the provisions of this Act, so far as relates to the Courts of Queen's Bench and Common Pleas, and to the County Courts as Courts of Law, the several provisions of the Common Law Procedure Act shall, so far as applicable and not inconsistent with this Act, apply to this Act, and sections 333 to 340, and section 344 of the said Common Law Procedure Act, shall be deemed incorporated herewith, as if the provisions therein contained had been repeated in this Act and expressly made to apply hereto, and it shall not be necessary to lay before Parliament any rules, orders or regulations made for the purpose of this Act. 22 V. c. 33, s. 18.

XXIII. The Court of Chancery shall, with reference to the proceedings in the Court of Chancery under this Act, and to proceedings under this Act in the County Courts in the exercise of their equitable jurisdiction, have all the powers which the next preceding section of this Act gives to the Common Law Courts, in respect to the cases to which the sections of the Common Law Procedure Act therein specially mentioned refer. 22 V. c. 33, s. 19.

The sections of the Common Law Procedure Act referred to, are those which empower the Judges of the Superior Courts of Law, to make rules for regulating the practice.

XLI. In case any party has obtained a judgment in any Court in Upper Canada, such party, or any person entitled to enforce such a judgment, may apply to such Court or to any Judge having authority to dispose of matters arising in such Court, for a rule or order that the judgment debtor shall be orally examined upon oath before the Clerk of the Crown, or before the Judge or Clerk of the County Court within the jurisdiction of which such debtor may reside, or before any other person to be named in such rule or order, touching his estate

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and effects, and as to the property and means he had when the debt or liability which was the subject of the action in which judgment has been obtained against him was incurred, and as to the property and means he still hath of discharging the said judgment, and as to the disposal he may have made of any property since contracting such debt or incurring such liability; and in case such debtor does not attend as required by the said rule or order, and does not allege a sufficient excuse for not attending, or if attending, he refuses to disclose his property or his transactions respecting the same, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, such Court or Judge may order such debtor to be committed to the Common Gaol of the County in which he resides for any time not exceeding twelve months, or such Court or Judge may, by rule or order, direct that a writ of *capias ad satisfaciendum* may be issued against such debtor, and a writ of *capias ad satisfaciendum* may thereupon be issued upon such judgment, or in case such debtor enjoys the benefit of the gaol limits, such Court or Judge may make a rule or order for such debtor's being committed to close custody under the thirty-fifth section of this Act. 22 V. c. 96, s. 13.

The 27 & 28 V. c. 25, enacts, that the words, "in case any party has obtained a judgment in any Court in Upper Canada," as used in section 41 of chapter 24 of the Consolidated Statutes for Upper Canada, shall from the coming into force of this Act, for all the purposes of the said cited Act, be taken to mean, as well a party defendant as a party plaintiff, and to extend to all judgments, whatever the cause of action for which the sum may be recovered.

Before the passing of the 27 & 28 V., c. 25, it was held that a plaintiff against whom the defendant had recovered a judgment for costs only, was not liable to be examined or committed, *Re Hawkins*, 9 U. C. L. J. 295.

CON. STAT. U. C., CAP. XXXV. AN ACT RESPECTING ATTORNEYS AT LAW.

ss. xxvii-xliv.

XXVII. No Suit at Law or Equity shall be brought for the recovery of fees, charges or disbursements, for business done by any Attorney or Solicitor as such, until one month after a Bill thereof, subscribed with the proper hand of such Attorney or Solicitor, his Executor, Administrator or Assignee, (or, in the case of a partnership, by one of the partners, either with his own name, or with the name or style of such partnership,) has been delivered to the party to be charged therewith, or sent by the Post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, or been enclosed in or accompanied by a letter subscribed in like manner, referring to such Bill. 16 V. c. 175, s. 20.

The Act should be construed liberally for the client, *Williams v. Gryffiths*, 10 M. & W. 125; *Engleheart v. Moore*, 15 M. & W. 548.

As to whether Courts of Equity have, independently of Statute, jurisdiction to order taxation of bills of costs, see *Ex parte Arrowsmith*, 13 Ves. 124; *Ex parte Lord Cardross*, 5 M. & W. 545; *Cowdell v. Neale*, 1 C. B. N. S. 332; *Re Forsyth*, 34 Beav. 140; 13 W. R., 932.

An assignee in bankruptcy, is an assignee within the meaning of this Act, *Re Walton* 4 K. & J. 78.

As to pleading non-delivery at law, see *Flower v. Newton*, 11 Jur. 875; *Lane v. Glenny*, 7 Ad. & El. 83; *Hichins v. Tate*, 7 O. B. 875.

An attorney may set off a bill before delivery, *Lester v. Lazarus*, 2 O. M. & R. 665; or prove in bankruptcy, *Ex parte Prideaux*, 1 Ql. & Jam. 28; *Ex parte Steele*, 16 Ves. 161; or sue on a promissory note or other collateral agreement, *Jeffreys v. Evans*, 14 M. & W. 210; *Thomas v. Cross*, 13 W. R. 166. See, in the latter case, comments on *Waugh v. Waddell*, 16 Beav. 521.

The summary jurisdiction does not exclude the right of a client to file a bill against his solicitor for an account, *Morgan v. Higgins*, 5 Jur. N. S. 286; *O'Brien v. Lewis*, 9 Jur. N. S. 321; or to enforce an agreement for delivery by petition, *Re Bailey*, 34 Beav. 882.

After taxation, an action by the solicitor is a contempt, *Re Campbell*, 3 D. M. G. 585.

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By "month," a calendar month is meant, *Ryalls v. Reg.* 12 Jur. 458; and the month is to be computed exclusively of the days on which the bill is delivered and the action brought; *Blunt v. Heslop*, 8 Ad. & El. 577; *Re Morphy & Kerr*, 2 Cham. R. 56.

As to what constitutes delivery, see *Welsh v. Silwell*, 11 Jur. 471; *Flower v. Newton*, 11 Jur. 875; *Eggington v. Cumberlege*, 11 Jur. 932; *Blandy v. DeBurgh*, 6 C. B. 623; *Gridley v. Austen*, 16 Q. B. 504; *Phipps v. Daubeny*, 16 Q. B. 514; *Spyer v. Bernard*, 8 L. T. N. S. 396; in the case of a public officer, *Champ v. Stokes*, 6 H. & N. 683; and in that of the committee of a public company, *Edwards v. Lawless*, 5 Rail. Ca. 357; *Mant v. Smith*, 4 H. & N. 324.

Delivery to a duly authorized agent of the client is sufficient, *Re Bush*, 8 Beav. 66; or to his servant, *McGregor v. Keiley*, 3 Exch. 794; but not to his solicitor, nor to a friend or relation, *Re Abbott*, 4 L. T. N. S. 576; *Gridley v. Austen*, 16 Q. B. 504, 511.

The bill may be sent by post, *Roberts v. Lucas*, 11 Exch. 41; *Taylor v. Hodgson*, 3 Dowl. & Low. 115.

Where the action was brought against the executors of the client, delivery to the client in his lifetime was considered enough, *Reynolds v. Caswell*, 4 Taunt. 193; *Tate v. Hichins*, 7 C. B. 875.

The bill must be left, not shown merely, *Crowder v. Shee*, 1 Camp. 437; *Phipps v. Daubeny*, 16 Q. B. 514.

The bill, or some accompanying document must specify the persons to be charged, *Taylor v. Hodgson*, 3 Dowl. & Low. 115; *Robert v. Lucas*, 11 Exch. 41; *Gridley v. Austen*, 16 Q. B. 504; *Champ v. Stokes*, 6 H. & N. 683; the Court in which the business was done, *Lewis v. Primrose*, 6 Q. B. 265; *Dimes v. Wright*, 8 C. B. 831; the name of the cause, *Keene v. Ward*, 13 Q. B. 515; and the particular items charged for, *Drew v. Clifford*, 2 Car. & P. 69; *Re Smith*, 4 Beav. 309; *Re Pender*, 10 Beav. 390.

It is sufficient, as a general rule, if the bill gives such information as will enable the client to obtain advice as to taxation, *Frowd v. Stillard*, 4 Car. & P. 51; *Sargent v. Gannon*, 7 C. B. 742; *Cook v. Gillard*, 1 El. & Bl. 26; *Haigh v. Oussey*, 7 El. & Bl. 578.

XXVIII. Upon the application of the party chargeable by such Bill within such month, any of the Superior Courts of Law or Equity, or any Judge thereof, or any Judge of a County Court shall, without any money being brought into Court, refer the Bill, and the demand thereon, to be taxed by the proper officer of any of the Courts in which any of the business charged for in such Bill was done; and the Court or Judge making such reference

shall restrain the bringing any suit for such demand pending the reference.

A party in contempt may apply for taxation, *Newton v. Ricketts*, 11 Beav. 67.

A married woman who has separate estate, which she has by agreement made liable, is a party chargeable within the Act, *Waugh v. Waddell*, 16 Beav. 521; *Murray v. Barlee*, 3 M. & K. 209; but see *Re Pugh*, 17 Beav. 336; so is the next friend of an infant, *Re Fluker*, 20 Beav. 143; or the executors of the party originally liable, *Jefferson v. Warrington*, 7 M. & W. 137; or his assignee in bankruptcy, *Clarkson v. Barber*, 7 Dowl. 87.

A married woman must apply by her next friend, *Waugh v. Waddell*, 15 Beav. 508.

Where several parties are jointly chargeable, they should concur in the application, *Re Lewin*, 16 Beav. 608; *Re Perkins*, 8 Beav. 241; *Re Mobbs*, 8 Beav. 499; and an order obtained by one of them, on an allegation that he alone employed the solicitor, will be discharged as irregular, *Re Beecher, Barker and Street*, 2 Cham. R. 5215; *Hoby v. Pritchard*, 2 M. & W. 124.

If one of the parties liable refuses to concur, the order may be obtained by the other, *Hazard v. Lane*, 3 Mer. 285; *Lockhart v. Hardy*, 4 Beav. 224; the one refusing to concur should be served with the petition, *Re Hair*, 10 Beav. 187; 11 Jur. 139; but the order cannot be made after action has been brought against the two, *Re Chilcote*, 1 Beav. 421.

As to security for costs being required from the party applying, see *Re Dolman*, 11 Jur. 1095; *Re Pasmore*, 11 Beav. 94; *Re Foley*, 11 Beav. 456; *Murrow v. Wilson*, 12 Beav. 497.

The fact that an action is pending for the amount of a bill, does not give the Common Law Judge jurisdiction to tax the bill, *Sayer v. Bush*, 7 Man. & Gr. 1027; *Cowdell v. Neale*, 1 C. B. N. S. 332.

An order of course, though right on the merits, will be dismissed if obtained in a case where a special application was necessary, *Harris v. Sturt*, 4 M. & C. 261; *Grove v. Samson*, 11 Beav. 297; *Gregg v. Tuxley*, 1 Beav. 123; as to the costs of a special application, where an *ex parte* application would have been sufficient, see *Re Cattlin*, 8 Beav. 121; *Re Bracey*, 8 Beav. 338; *Re Bignold*, 9 Beav. 269; *Re Adamson*, 18 Beav. 460; *Re Atkinson*, 26 Beav. 151; *Re Leit*, 31 Beav. 488.

A special application is necessary where the application is to tax part only of the bill claimed, *Re Byrch*, 8 Beav. 124; *Re Dalby*, 8 Beav. 469; *Re Wavell*, 22 Beav. 634; *Re Yette*, 33 Beav. 412; *Stokes v. Trumper*, 2 K. & J. 282; but see *Re Hinton*, 15 Beav. 192; *Re Fluker*, 20 Beav. 148; or where it is made by some only of several parties jointly liable, *Re Hlderton*, 33 Beav. 201; or where there is a special agreement as to retainer, *Re Thurgood*, 19 Beav. 541; or a special agreement as to the costs,

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Re Winterbotham, 15 Beav. 80; or to give the solicitor a lien, *Re Moss*, 17 Beav. 59; and see *Re Ransom*, 18 Beav. 220; *Re Fisher*, 18 Beav. 183.

A special agreement respecting part of the costs, unless it goes to the whole bill, is not a bar to an order for taxation, though formerly held to be so, *Re Eyre*, 10 Beav. 569; 2 Phil. 367; *Re Forsyth*, 34 Beav. 140; *Re Thompson*, 14 L. T. N. S. 6; but if the fact of the agreement is suppressed, the order will be discharged, *Re Carven*, 8 Beav. 436; *Re Holland* 19 Beav. 314; *Re Ingle*, 21 Beav. 275.

An agreement to charge a fixed sum in lieu of costs hereafter to be incurred is void, *Philby v. Hazle*, 7 Jur. N.S. 125; *Pince v. Beattie*, 11 W. R. 979; *Re Newman*, 30 Beav. 196; but as to an agreement to pay a solicitor a fixed salary, see *Galloway v. Corporation of London*, 4 L. R. Eq. 90.

The Solicitor may waive an irregularity in obtaining the order, *Re Hair*, 11 Beav. 96; *Re Bevan*, 12 W. R. 196; *Re Bartrum*, 12 W. R. 660, *Re Field*, 16 Beav. 593; *Re Wavell*, 22 Beav. 634.

XXIX. In case no application be made within the month, then the Court or Judge upon the application of either party may order a reference with such directions and conditions as he may deem proper; and may upon such terms as may be thought just restrain any suit for such demand pending the reference.

XXX. No such reference shall be directed upon application made by the party chargeable with such Bill after a verdict has been obtained or a Writ of Inquiry executed, or after twelve months from the time such Bill was delivered, sent or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the Court or Judge to whom the application for the reference is made.

To entitle a client to taxation after twelve months' he must shew either "pressure accompanied by some overcharge," or "gross overcharge amounting to fraud," *Re Strother*, 3 K. & J. 518; *Re McKay*, 15 L. T. N. S. 101.

As to what circumstances constitute such pressure or fraudulent overcharge, see notes to Section 42.

Where the client has not had proper opportunity to examine the bill, taxation after twelve months has been allowed, *Re Williams*, 15 Beav. 417; but he must shew that there has been no undue laches or acquiescence on his part, *Re Barnard*, 9 D. M. & G. 359.

The lapse of less than twelve months may be an objection to granting the application, *Re Bayley*, 18 Beav. 415; *Re Pugh*, 32 Beav. 173; 11 W. R. 762; *Re Browne*, 1 D. M. & G. 322.

A dispute and correspondence as to alleged omissions in the bill held sufficient apology for the lateness of the application, *Re Bagshawe*, 2 DeG. & Sm. 205; and where the relation of solicitor and client continued until within a year before the application was made, and the last account had been delivered within the year, it was held a material circumstance in accounting for the delay, *Re Nicholson*, 3 D. F. & J. 93, 100; but the solicitor's possession of the papers in the suit was not, *Re Gedye*, 14 Beav. 56.

For cases where lapse of time and laches have been a bar to taxation, see *Re Vines*, 2 D. M. & G. 842; *Blagrove v. Routh* 8 D. M. & G. 620.

The Court on ordering taxation after the twelve months, will, if necessary, restrict the taxation within certain limits, *Re Nicholson*, 3 D. F. & J. 93.

XXXI. In case either party to any such reference, having due notice, refuses or neglects to attend the taxation, the officer to whom the reference is made, may tax the Bill *ex parte*; and in case the reference is made upon the application of either party, and the party chargeable with the Bill attends the taxation, the costs of the reference shall be paid according to the event of the taxation, except that if a sixth part be taxed off, the costs shall be paid by the party by whom or on whose behalf, such Bill was delivered; and if less than a sixth part be taxed off, then by the party chargeable with such Bill, if he applied for or attended the taxation.

Where the solicitor obtains the order for taxation, and the client does not attend on the taxation, the Court has no discretion as to allowing the costs of the taxation, *Re Kerr*, 2 Cham. R. 47.

Only those payments are allowed on taxation which are made by the solicitor in his professional capacity. *Re Remnant*, 11 Beav. 603; cash payments made by the solicitor in proceedings where he was not professionally concerned, are not allowed to be included. *Heming v. Wilson*, 4 Car. & P. 318; *Re Lees*, 5 Beav. 410; *Prothero v. Thomas*, 6 Taunt. 196.

Where a solicitor has been retained for a particular business, his bill of costs for carrying it through, constitutes one bill, *Stokes v. Trumper*, 2 K. & J. 232; *Re Peach*, 2 Dow. & L. 33.

After the bill has been referred for taxation no alteration can be made in it, *Re Wells*, 8 Beav. 416; *Re Catlin*, 18 Beav. 519; *Davis v. Earl of*

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Dysart, 21 Beav. 124; 8 D. M. & G. 33; except by consent, or on special application for leave to amend, *Re Andrews*, 17 Beav. 510, 514. This leave has been given to amend, by inserting omitted items, and increasing under charges, *Re Crawford & Crombie*, 2 Cham. R. 13; but not to decrease over charges, *Re Whalley*, 20 Beav. 576; nor to withdraw items improperly inserted, *Re Carven*, 8 Beav. 436; *Re Jones*, 8 Beav. 479; *Re Blakesly*, 32 Beav. 379.

A solicitor having delivered his bill, is bound by it so far, that he cannot substitute another bill for it, even before notice of an order to tax is served on him, without paying all the costs incurred by the client up to the date of obtaining such order, *Re Chambers*, 34 Beav. 177.

The rule as to one sixth is imperative in an ordinary reference to taxation, *Re Woollett*, 12 M. & W. 504; but where the reference is special, the costs are in the discretion of the Judge, *Toghill v. Grant*, 6 Beav. 348; *Higgins v. Woolcot*, 5 B. & C. 760; and see *Muy v. Biggenden*, 24 Beav. 207 *Re Hair*, 11 Beav. 96.

Where more than a sixth is taken off, the assignees of an insolvent, or bankrupt solicitor are personally liable for the costs of taxation, *Re Peers*, 21 Beav. 520; *Re Peile*, 25 Beav. 561; and under similar circumstances, the insolvent was, notwithstanding his discharge, held personally liable, *Whalley v. Williamson*, 6 Man. & Gr. 269.

Where a bill was ordered to be taxed, (questions as to liability being reserved,) and less than a sixth was struck off, it was held that, whatever might be the result of the questions reserved, the client must pay the costs of taxation, *Re Shaw*, 20 L. J. Q. B. 280.

Where the Master disallows some items and adds others, the bill is to be considered as increased by the items allowed, and then reduced by those disallowed, *Re Hartley*, 2 Jur. N. S. 443; and see *Re Clark*, 13 Beav. 173; 1 D. M. & G. 43.

Items included, which are chargeable against another person, must be reckoned in as against the solicitor, *Re Colquhoun* 1 Sm. & G. app. 1; 5 D. M. & G. 35.

Where a solicitor offered to make a reduction in his bill, the Court held the Master should not charge him with the costs of taxation, unless the bill had been reduced one sixth independently of the voluntary deduction, *Re Freeman, Craigie & Proudfoot*, 1 Cham. R. 102.

XXXII. Every order for such reference shall direct the Officer to whom the reference is made, to tax the costs of the reference, and to certify what, upon the reference, he finds to be due to or from either party in respect of such Bill and of the costs of the reference, if payable.

An order directing taxation of the costs of a suit warrants taxation up

to the date of the Taxing Master's report, *Quarrell v. Beckford*, 1 Mad. 285.

XXXIII. Such Officer may certify specially any circumstances relating to such Bill or taxation, and the Court or Judge may thereupon make such Order as may be deemed right respecting the payment of the costs of the taxation.

XXXIV. In case such reference be made when the same is not authorized, except under special circumstances as hereinbefore provided, the Court or Judge in making the same may give any special directions relative to the costs of the reference.

XXXV. Where no Bill has been delivered, sent or left as aforesaid, and where such Bill if delivered, sent or left, might have been referred as aforesaid, any such Court or Judge may order the delivery of a Bill, and may also order the delivery up of Deeds or papers in the possession, custody or power of the Attorney or Solicitor, his Assignee or representatives, in the same manner as has heretofore been done in cases where any such business had been transacted in the Court in which such Order was made.

Orders under this section may be enforced by attachment, *Re Bowen*, 11 W. R. 607; no action at law lies for disobedience to the order, *Dent v. Basham*, 9 Exch. 469.

Where the order was not obeyed, and the solicitor swore that he had no papers from which he could make out his bill, the Court refused to commit him for non-delivery, *Re Kerr*, 12 Beav. 390.

The Court will, before the completion of the taxation, order the delivery of papers to the client, either upon payment into Court of the amount claimed, or where it appears from the solicitor's own account that a balance is due from him to the client, *Re Beaven*, 33 Beav. 439; as to inserting a direction for delivery of papers in the common order for taxation, see *Re Pender*, 8 Beav. 299; *Re Teague*, 11 Beav. 318.

As to delivery of papers, and the solicitor's lien for his costs, where the solicitor is changed, or discharges himself pendent lite, see notes to Ord. 49.

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XXXVI. In proving a compliance with this Act, it shall not be necessary in the first instance to prove the contents of the Bill delivered, sent or left, but it shall be sufficient to prove that a Bill of fees, charges or disbursements subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent or left in manner aforesaid; but the other party may shew that the Bill so delivered, sent or left, was not such a Bill as constituted a *bona fide* compliance with this Act.

XXXVII. Any Judge of the Superior Courts of Law or Equity, or a County Judge, on proof to his satisfaction that there is probable cause for believing that the party chargeable is about to quit Upper Canada, may authorize an Attorney or Solicitor to commence an action for the recovery of his fees, charges or disbursements against the party chargeable therewith, although one month has not expired since the delivery of a Bill as aforesaid. 16 V. c. 175, s. 20.

XXXVIII. When any person not being chargeable as the principal party is liable to pay or has paid any Bill either to the Attorney or Solicitor, his Assignee, or representative, or to the principal party entitled thereto, the party so paying, his Assignee or representative, may make the like application for a reference thereof to taxation and in like manner as the party chargeable therewith might himself have made, and the same proceedings shall be had thereupon, as if such application had been made by the party so chargeable.

A mere volunteer, under no previous liability, undertaking to pay a solicitor's bill, does not require a right to tax it, *Re Becke* 5 Beav. 406; but where a suit was compromised, plaintiff agreeing to pay defendant's costs, plaintiff was held entitled to an order for taxation of the bill, *Re Hartley*, 30 Beav. 620.

The bill of a mortgagee's solicitor for business done in regard to the mortgaged estate, may be taxed by the mortgagor, *Re Lees*, 5 Beav. 410;

Re Crew, 8 Beav. 150; *Re Wells*, 8 Beav. 416; or by a subsequent incumbrancer, *Re Taylor*, 18 Beav. 165; *Re Jessop*, 32 Beav. 406.

The taxation at the instance of the third party must be as between the solicitor and his client, not as between the solicitor and the third party, *Re Wells*, 8 Beav. 416; *Re Jones*, 8 Beav. 479; *Re Fyson*, 9 Beav. 117; *Re Barron*, 17 Beav. 547; and if the client is not entitled to tax the bill, as if it has been paid without pressure, &c., the third party cannot tax it; but if an excessive amount has been paid he must file a bill against the client who paid the bill to reduce his liability, *Re Massey*, 34 Beav. 463; and see *Re Foreyth*, 34 Beav. 140; on appeal, 13 W. R. 932.

XXXIX. In case such application is made when, under the provisions hereinbefore contained a reference is not authorized to be made except under special circumstances, the Court or Judge to whom the application is made, may take into consideration any additional special circumstances applicable to the person making it, although such circumstances might not be applicable to the party chargeable with the Bill, if he was the party making the application. 16 V. c. 175, s. 21.

As to the meaning and effect of this section, see *Re Vardy*, 20 L. J. Ch. 325.

XL. For the purpose of any such reference upon the application of the person not being the party chargeable, or of a party interested as aforesaid, such Court or Judge may order the Attorney or Solicitor, his Assignee or representative, to deliver to the party making the application a copy of the Bill, upon payment of the costs of the copy. 16 V. c. 175, s. 22.

XLI. No Bill previously taxed shall be again referred, unless under the special circumstances, the Court or Judge to whom the application is made thinks fit to direct a retaxation thereof. 16 V. c. 175, s. 22.

XLII. The payment of any such Bill as aforesaid, shall in no case preclude the Court or Judge to whom application may be made from referring such Bill for tax-

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ation, if the application be made within twelve months, and if the special circumstances of the case in the opinion of such Court or Judge appear to require the same, upon the terms and subject to the directions which to the Court or Judge seem right. 16 V. c. 175, s. 23.

The giving of security is for the purpose of this section equivalent to payment, *Ex parte Turner*, 5 D. M. & G. 540; *Sayer v Waggettaffe*, 5 Beav. 415; *Re Currie*, 9 Beav. 602; *Re Harper*, 10 Beav. 254; *Re Fairbanks*, 1 Cham. R. 222; but retainer by the Solicitor is not, *Re Steele*, 20 L. J. Ch. 562; *Re Bignold*, 9 Beav. 269; but see *Ex parte Shackell*, 2 D. M. & G. 842; *Ex parte Heming*, 28 L. T. 144.

"Special circumstances" have generally been held to signify either "pressure, accompanied by some overcharge," or "overcharges or errors so gross as to amount to fraud."

For cases of pressure, such as the refusal to deliver up deeds, see *Re Alcock*, 2 Coll. 92; *Re Elmalie*, 12 Beav. 538; *Re Lett*, 31 Beav. 488; *Re Pugh*, 32 Beav. 173; 1 D. J. & S. 673; or threats to enforce securities, *Re Kinneir*, 7 W. R. 175; *Re Rance*, 22 Beav. 177; *Re Foster*, 2 D. F. & J. 105; or generally taking advantage of the exigences of the client's position, *Re Stephen*, 2 Ph. 562; *Nokes v. Wharton*, 5 Beav. 448. These cases do not apply if the client has had an opportunity of examining and taxing the bill, *Re Neate*, 10 Beav. 181; *Re Welchman*, 11 Beav. 319; *Re Currie*, 9 Beav. 602; *Re Boyle*, 5 D. M. & G. 540; *Re Browne*, 1 D. M. & G. 322. In *Re Barrow*, 17 Beav. 547, the M. R. said the doctrine of pressure in cases of taxation after payment is not to be extended.

The Court will only direct taxation if there is at least a reasonable belief that if the bill be taxed, some of the charges will be disallowed, *Re Sladden*, 10 Beav. 488; therefore some items of overcharge should be pointed out, *Re Brady*, 15 W. R. 632; though not necessarily such as amount to fraud, *Re Newman*, 15 W. R. 630; *Re Wells*, 8 Beav. 416; *Re Hubbard*, 15 Beav. 251; *Re Abbott*, 18 Beav. 393; *Re Towle*, 30 Beav. 170.

The absence of any affidavit or other evidence as to items of overcharge, will be a reason for dismissing the petition, *Ex parte Barton*, 16 Beav. 585; 4 D. M. & G. 108; *Re Thompson*, 2 Cham. R. 100.

That the bill was paid under protest is material only if connected with circumstances of overcharge or pressure, and where a bill is paid under protest, the items objected to should, if possible, be pointed out, *Re Dearden*, 9 Exch. 210, *Re Bayley*, 18 Beav. 415; *Re Davie*, 8 W. R. 15.

Where there has been no pressure the Court will, after payment, order taxation only on proof of "overcharges amounting to evidence of fraud," *Re Stotter*, 3 K. & J. 518. Some of the particular items relied on must



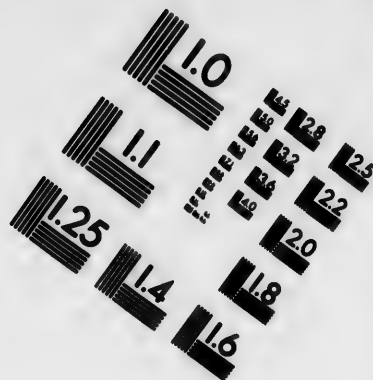
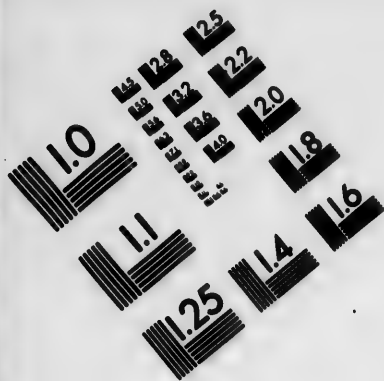
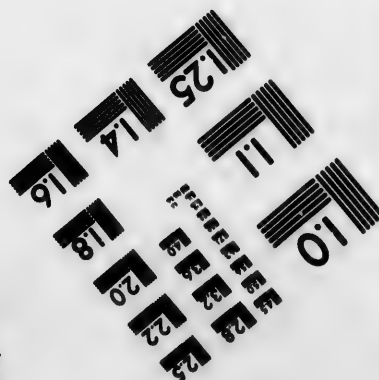
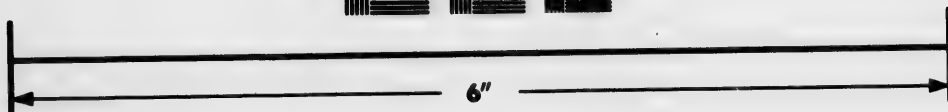
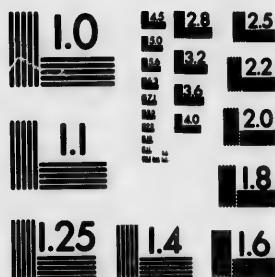


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be specifically pointed out, *Dunt v. Dunt*, 9 Beav. 146; *Re Towle*, 30 Beav. 170; *Re Browne*, 1 D. M. & G. 322, 333; trifling items will be insufficient, *Re Drake*, 8 Beav. 123; *Re Thompson*, 8 Beav. 237; *Re Bayley*, 18 Beav. 415; if the practice in the taxing-master's office as to allowing the items objected to is uncertain, the solicitor has the benefit of the doubt, *Re Walsh*, 12 Beav. 490; and generally the onus rests on the client to shew that the charges under the special circumstances were fraudulent, *Re Towle*, 30 Beav. 170.

Where the overcharges evidence actual fraud, very slight circumstances will induce the Court to re-open the taxation, *Nokes v. Warton*, 5 Beav. 448; *Re Harding*, 10 Beav. 250.

See also as to great overcharges, *Sayer v. Wagstaff*, 5 Beav. 415; *Re Bennett*, 8 Beav. 467; *Re Sladden*, 10 Beav. 488; *Ex parte Andrews*, 13 L. J. Ch. 222; *Ex parte Hemming*, 28 L. T. 144.

XLIII. In all cases in which a Bill is referred to be taxed, the Officer to whom the reference is made may request the proper Officer of any other Court, to assist him in taxing any part of such Bill, and such Officer, so requested, shall thereupon tax the same, and shall have the same powers, and may receive the same fees in respect thereof, as upon a reference to him by the Court of which he is such Officer, and he shall return the Bill, with his opinion thereon, to the Officer who so requests him to tax the same. 16 V. c. 175, s. 24.

XLIV. All applications made to refer any Bill to be taxed, or for the delivery of a Bill, or for the delivering up of deeds, documents and papers, shall be made "in the matter of such Attorney or Solicitor;" and upon the taxation of any such Bill, the certificate of the Officer by whom the Bill is taxed shall (unless set aside or altered by order of a Judge, Decree or Rule of Court,) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid may be enforced according to the course of the Court in which the reference has been made. 16 V. c. 175, s. 25.

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CON. STAT. U. C. CAP. LXIX.—AN ACT RESPECTING THE PROPERTY OF RELIGIOUS INSTITUTIONS IN UPPER CANADA.

SS. VIII.—XII.

VIII. When land held by trustees for the use of a congregation or religious body, becomes unnecessary to be retained for such use, and it is deemed advantageous to sell the land, the trustees for the time being may give public notice of an intended sale, specifying the premises to be sold and the time and terms of sale; and after publication of the notice for four successive weeks, in a weekly paper published in or near the place where the lands are situated, they may sell the land at public auction according to the notice, but the trustees shall not be obliged to complete or carry a sale into effect if in their judgment an adequate price is not offered for the land.

IX. The trustees may thereafter sell the land either by public or private sale; but a less sum shall not be accepted at private sale than was offered at public sale.

X. Before a deed is executed in pursuance of a public or private sale, the congregation or religious body for whose use the lands are held, shall be duly notified thereof, and the sanction of the Court of Chancery obtained for the execution of the deed. 18 V. c. 119, s. 5,—12 V. c. 91, s. 2.

On an application to the Court under this section, the deed under which the trustees hold the property must be produced, in order that the Court may be satisfied that the property is vested in them as trustees within the meaning of this Act.

It is essential that all the requirements of the statute should be complied with, *Re Second Congregational Church Toronto*, 1 Cham. R. 349. Where land was vested in Trustees for the use of, and as a place of residence for, a Minister of a religious body, and for such other purposes as the ministers of such religious body, at their general conference, might from time to time appoint, it is not "land held by the trustees for the con-

gregation or religious body" within the meaning of this Act, and the Court has no power to sanction the exception of any deed conveying the land by the trustees, *Re Methodist Episcopal Church, Chur^hville*, 1 Oham. R. 305.

XI. Trustees selling or leasing land under the authority of this act shall, on the first Monday in July in every year, have ready and open for the inspection of the congregation or religious body which they represent, or of any member thereof, a detailed statement shewing all rents which accrued during the preceding year, and all sums of money whatever in their hands for the use and benefit of the congregation or religious body, which were in any manner derived from the lands under their control or subject to their management, and also shewing the application of any portion of the money, which has been expended on behalf of the congregation or body 18 V. c. 119, s. 6.

XII. The Court of Chancery may in a summary manner, on complaint upon oath by three members of a congregation or religious body, of any misfeasance or misconduct on the part of trustees in the performance of duties authorised by this Act, call upon the trustees to give in an account; and may enforce the rendering of such account, the discharge of any duties, and the payment of any money, so that the congregation or religious body may have the benefit thereof; and the Court may compel the trustees, in case of any misconduct, to pay the expense of the application, or may award costs to the trustees in case the application be made on grounds which the Court considers insufficient or frivolous or vexatious. 18 V. c. 119, s. 7

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CON. STAT. U. C. CAP. LXXIV.—AN ACT RESPECTING CUSTODY OF INFANTS.

SS. VIII.—XI.

VIII. Any of the Superior Courts of Law or Equity in Upper Canada, or any judge of any of such courts, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, may, if such Court or Judge sees fit, make order for the access of the petitioner to such infant, at such times and subject to such regulations as such Court or Judge thinks convenient and just, and if such infant be within the age of twelve years, may make order for the delivery of such infant to the petitioner, to remain in the care and custody of the petitioner until such infant attains the age of twelve years, subject to such regulations as such Court or Judge may direct, and such Court or Judge may also make order for the maintenance of such infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled, of such sum or sums of money from time to time, as, according to the pecuniary circumstances of such father or the value of such estate, such Court or Judge thinks just and reasonable. 18 V. c. 126, s. 1.

IX. The Court or Judge as aforesaid may enforce the attendance of any person before such Court or Judge, to testify on oath respecting the matter of such petition by order or rule made for that purpose, and on the service of a copy thereof and the payment of expenses as a witness, in the same manner as in a suit or action in the said Courts respectively, or may receive affidavits respecting the matters in such petition. 18 V. c. 126, s. 2.

X. All orders made by the Court or a Judge by virtue

of this Act, shall be enforceable by process of contempt by the Court or Judge by which or by whom such order has been made. 18. V. c. 126, s. 3.

XI. No order directing that the mother shall have the custody of or access to an infant shall be made by virtue of this Act, in favor of a mother, against whom adultery has been established by judgment in an action for criminal conversation, at the suit of her husband against any person. 18 V. c. 126, s. 4.

As to the objects contemplated by the English Act 2 & 3 Vic. c. 54, upon which this statute is founded, see Lord Cottenham's judgment in *Warde v. Warde*, 2 Phill. 787.

As to where jurisdiction will be exercised by the Court, see *Re Finn*, 2 DeG. & S. 457; *Re Tomlinson*, 3 DeG. & S. 371; such jurisdiction extends both to foreign infants in the country, and native infants out of the jurisdiction, *Hope v. Hope*, 4 D. M. & G. 328.

Under this statute a married woman may petition in her own name, without naming a next friend, *Re Groom*, 7 Hare 38; or, in forma pauperis *Ex parte Hakevell*, 3 D. M. & G. 116; and the order may be made *ex parte*, if the necessity of the case requires it, *Re Taylor*, 11 Sim. 178.

The Courts in England have refused to interfere, where the wife has unjustifiably deserted her husband, *Re Taylor*, 11 Sim. 178; where the mother has contracted extravagant habits, is without means of contributing to the child's support, and has married a second time, concealing the fact from the child's guardians, *Shillito v. Collett*, 8 W. R. 683; or where there had been prior immorality on her part and there was want of *bona fides* in the application, where there was an alleged object in view and a probable chance of contamination, *Re Moore*, 11 Irish Com. Law Reports, 1; *Re Winscom*, 2 H. & M. 540.

The Court has removed the children from the father on the grounds, of notorious immorality, *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Thomas v. Roberts*, 3 DeG. & Sm. 758; avowed infidelity, *Shelley v. Westbrook*, Jac. 266; infamous criminality, though not followed by judicial conviction, *Anon*, 2 Sim. N. S. 54; *Swift v. Swift*, 34 Bear. 266; cruelty and removal out of jurisdiction, *DeManneville v. DeManneville*, 10 Ves. 63; but have refused to do so on the ground of poverty, or of peculiar religious views, *Curtis v. Curtis*, 5 Jur. N. S. 1147.

On the other hand, where the father had abandoned the care of the children to their aunt the guardian of their fortunes, and was himself in embarrassed circumstances, his application to have them returned to him was refused, *Lyons v. Blenkin*, Jac. 245.

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Where natural children had been provided for by the father and were under the care of a guardian appointed by him, the Court did not debar the mother from access to the children, but referred to the Master to ascertain what might reasonably be allowed, *Courtois v. Vincent*, Jac. 268.

For other cases on the subject see those referred to in the cases cited above.

As to the principles which govern the Court in relation to guardianship, and religious education of infants, see *Austin v. Austin*, 34 Beav. 257; *Re Newberry*, 1 L. R. Eq. 431; 1 L. R. Ch. 263; *Re Kaye*, 1 L. R. Ch. 387; *Nugent v. Vetzera*, 2 L. R. Eq. 704; *Anon*, 6 Grant, 632.

Although no suit is pending, the Court will, on the petition of the guardian duly appointed by the Surrogate Court, interfere summarily and order the person of the infant to be delivered into the custody of the guardian, where there is danger of the infant being removed out of the jurisdiction, *Re Gullrie*, 3 Grant, 279.

As to the right of a father to the custody of his children, and his obligations, and the jurisdiction of the Court to remove the children from his custody, if he neglects his duty, or on account of his immorality and profligacy, see 2 *W. & T. Leading Cases*, 613, 625, 651.

26TH VIC. CAP. XLI.—AN ACT RESPECTING AFFIDAVITS, DECLARATIONS AND AFFIRMATIONS MADE OUT OF THIS PROVINCE, FOR USE THEREIN.

HER Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

I. The Governor in Council may, by one or more commission or commissions under his hand and seal, from time to time, empower such and as many persons as he may think fit and necessary, to administer oaths and take and receive affidavits, declarations and affirmations in the United Kingdom of Great Britain and Ireland, or any Colony or dependency thereof, in or concerning any cause, matter or thing depending or in anywise concerning any of the proceedings to be had in the Courts of Queen's Bench and Common Pleas, the Superior Court,

and the Court of Chancery, or any other Court of Law or Equity of Record in this Province, whether now existing or hereafter to be constituted; and every oath, affidavit, declaration or affirmation taken or made as aforesaid, shall be as valid and effectual, and shall be of the like force and effect to all intents and purposes, as if such oath, affidavit, declaration or affirmation had been administered, taken, sworn, made or affirmed before a Commissioner for taking affidavits therein, or other competent authority of the like nature.

II. The Commissioners so to be appointed shall be styled "Commissioners for taking affidavits in and for the Canadian Courts."

III. Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made, out of Canada, before any Commissioner authorised by the Lord Chancellor to administer oaths in Chancery in England, or before any Notary Public, certified under his hand and official seal, or before the Mayor or Chief Magistrate of any City, Borough or Town Corporate in Great Britain or Ireland, or in any Colony of Her Majesty, or in any foreign country, and certified under the common seal of such City, Borough or Town Corporate, or before a Judge of any Court of supreme jurisdiction in any Colony belonging to the Crown of Great Britain, or any dependency thereof, or before any Consul, Vice-Consul, Acting-Consul, Pro-Consul or Consular Agent of Her Majesty exercising his functions in any foreign place, for the purposes of and in or concerning any of the proceedings to be had in the said Courts, shall be as good, valid and effectual, and shall be of like force and effect to all intents and purposes, as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in this Province before a Commissioner for taking affidavits therein, or other competent authority of the like nature.

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IV. Any document purporting to have affixed, impressed, or subscribed thereon or thereto the signature of any such Commissioner, or the signature and official seal of any such Notary Public, or the seal of the Corporation and the signature of any such Mayor or Chief Magistrate as aforesaid, or the seal and signature of any such Judge, Consul, Vice-Consul, Acting-Consul, Pro-Consul or Consular Agent, in testimony of any such oath, affidavit, affirmation or declaration having been administered, sworn, affirmed or made, by or before him, shall be admitted in evidence without proof of any such signature or seal and signature being the signature or the seal and signature of the person whose signature or seal and signature the same purport to be, or of the official character of such person.

V. Any affidavit, declaration or affirmation proving the execution of any Deed, Power of Attorney, Will, or Probate or Memorial thereof, for the purpose of registration in this Province, may be made before a Commissioner appointed under this Act, or other person authorized hereby to administer or take oaths, affidavits, declarations and affirmations.

VI. No informality in the heading or other formal requisites to any affidavit, declaration or affirmation made or taken before any Commissioner or other person under this Act, shall be any objection to its reception in evidence, if the Court or Judge before whom it is tendered think proper to receive it.

VII. If any person shall tender in evidence any such document as aforesaid with a false or counterfeit seal or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall be subject to the punishment by Law provided for felony.

27 & 28 VIC., CAP. V.—AN ACT FOR THE COLLECTION BY MEANS OF STAMPS, OF FEES OF OFFICE, DUES AND DUTIES PAYABLE TO THE CROWN, UPON LAW PROCEEDINGS AND REGISTRATIONS.

SS. I, XI.—XX, XXIX, XXX.

WHEREAS it is expedient that all Fees and Charges, payable to the Crown, for or upon any proceeding or matter in this Act mentioned shall be collected in the manner herein provided: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. Upon, from and after the first day of October next, Stamps shall be issued by order of the Governor in Council in such form and subject to such other directions as shall be thereby and as shall thereafter be from time to time by the like order provided, for the purposes hereinafter mentioned.

XI. Upon, from and after the day in the first section mentioned, no money shall be paid to or shall be received by any Court or to or by any officer entitled to receive any such fees as aforesaid, for any such fee due and payable to the Crown, under any of the said Acts.

The acts referred to in this section are, Con. Stat. U. C., cc. 15, 16, 19, & 33; c. 10, s. 29; c. 12, s. 11; c. 13, s. 65; and c. 35, s. 28.

XII. Upon, from and after the said day, no matter or proceeding whatever upon which any fee is due or payable to the Crown as aforesaid, shall be issued or shall be received or acted upon by any Court or by any officer entitled to receive any such fee until a stamp or stamps under this Act for the sum corresponding in amount with the amount of the fee so due or payable to the Crown as

aforesaid, for, upon or in respect of such matter or proceeding, and in lieu of such sum so due and payable to the Crown, shall have been attached to or impressed upon the same.

XIII. Every matter and proceeding whatever, upon which any such fee is due and payable to the Crown as aforesaid, and which is not so duly stamped shall, if not afterwards stamped under the provisions of this Act, be absolutely void for all purposes whatsoever.

XIV. In all cases of search, examining and authenticating office copies of papers made by the Attorney or Solicitor, and in all other cases where it has not been customary to use in reference to such search, examination, authentication, matter or thing, any written or printed document or paper whereon the stamp could be stamped or affixed, the party or his Attorney or Solicitor, requiring such matter or thing so to be done, shall make application for the same by a short note or memorandum in writing, and a stamp or stamps to the amount of the fee so payable, shall be stamped on or affixed to such note or memorandum.

XV. No Sheriff or other officer or person shall serve or execute any writ, rule, order or proceeding, or the copy of any writ, rule, order or proceeding upon which any such fee or charge is due or payable, and which is not duly stamped under this Act, and every such service and execution contrary to this Act shall be void, and no recompence shall be allowed therefor.

XVI. No matter or proceeding which may have been duly stamped for the purpose for which it may have been used, shall be considered as stamped for any other purpose, in case another fee or charge is due or payable thereon for any other or further use of the same matter or proceeding.

XVII. The Court in which any such matter or proceeding is, or is pending, which ought to be, but is not so duly stamped, shall not, nor shall any Judge of such Court take or allow any matter or proceeding to be had or taken upon, or in respect of such matter and proceeding, although no exception be raised thereto by any of the parties, until such matter or proceeding has been first duly stamped.

XVIII. Any party to any matter or proceeding in any Court which ought to be, but is not so duly stamped, may apply to the Court in which such matter or proceeding is pending, or to any Judge having jurisdiction in the case for leave to have the same duly stamped, and in case this Act has not been knowingly and wilfully violated, the application shall on payment of costs be granted for the duly stamping of such matter or proceeding with stamps of such amount beyond the fee due thereon as may be thought reasonable, not exceeding ten times the amount of the stamp.

XIX. The affixing of such stamp or stamps, under any order for that purpose, shall have the same effect as if the said matter or proceeding had been duly stamped in the first instance.

XX. In every case in which a stamp or stamps has or have, under this Act, been attached to or impressed upon any matter or proceeding, it shall be the duty of the officer who may issue or who may receive such matter or proceeding, forthwith upon the issue or upon the receipt thereof, to cancel the same by writing or stamping or impressing in ink on such stamp his name and the date thereof, so as effectually to obliterate and cancel the stamp, and so as not to admit of its being used again.

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shall knowingly receive, procure or deliver, or who shall knowingly serve or execute any writ, rule, order, matter or proceeding upon which any fee is due or payable to the Crown as aforesaid, without the same being first duly stamped under this Act, for the fee payable thereon, shall be subject for the first offence, to a fine not exceeding ten dollars, for the second offence, to a fine not exceeding fifty dollars, and for the third and every subsequent offence, to a fine of two hundred dollars; and in default of payment of such fines to an imprisonment not exceeding one month for the first offence, three months for the second offence and one year for the third and any subsequent offence.

XXX. Every person who shall fail or omit to obliterate and cancel any stamp in the manner and at the time hereinbefore provided, shall be subject to a fine not exceeding twenty dollars, and in default of payment thereof, to imprisonment for a period not exceeding two months.

28TH VIC. CAP. XVII.—AN ACT TO AMEND
THE CONSOLIDATED STATUTE RESPECT-
ING THE COURT OF CHANCERY.

HER Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. The Court of Chancery in Upper Canada shall have the same jurisdiction as the Court of Chancery in England has, in regard to leases and sales of settled estates, and in regard to enabling minors, with the approbation of the Court, to make binding settlements of their real and personal estate on marriage; and in regard to questions submitted for the opinion of the Court in the form of special cases on the part of such persons, as may by

themselves, their committees or guardians, or otherwise, concur therein.

The jurisdiction exercised by the Court of Chancery in England, in regard to leases and sales of settled estates, is regulated by the Imp. Acts 19 & 20 Vic. c. 120; 21 & 22 Vic. c. 77; 25 & 26 Vic. c. 108; & 28 Vic. c. 45.

As to what are settled estates within the meaning of these Acts, see *Re Laing's Settled Estates*, 1 L. R. Eq. 416; *Re Greene*, 10 Jur. N. S. 1098; *Re Bardin's Will*, 7 W. R. 711; *Re Clark*, 1 L. R. Ch. 292.

As to the mode of applying to the Court and the parties who may do so, see *Harvey v. Clark*, 25 Beav. 7; *Williams v. Williams*, 9 W. R. 888; *Re Thompson's Settled Estates*, Johns. 418; *Re Goodwin's Settled Estates*, 3 Giff. 620.

As to appointment of guardians for infants who may be interested, *Re Longstaff's Settled Estates*, 1 Dr. & Sm. 142; *Re Hargreave's Settled Estates*, 7 W. R. 156; *Re Caddick's Settled Estates*, 7 W. R. 334.

As to married women, and consents by them, see *Re Foster's Settled Estates*, 24 Beav. 220; 1 De G. & J. 386; *Re Lord De Tabley's Settled Estates*, 11 W. R. 936; *Re Bendyshe*, 3 Jur. N. S. 727.

As to the persons to be served with notice, or whose consent must be obtained, *Re Boughton*, 12 W. R. 34; *Re Tarbutt*, 8 L. T. N. S. 657; *Eyre v. Saunders*, 4 Jur. N. S. 830; *Grey v. Jenkins*, 26 Beav. 351; *Re Potts*, 15 W. R. 29; *Re Brown*, 11 W. R. 19.

If consent refused, lease cannot be made, however beneficial it might have been to the estate; *Re Merry's Estate*, 15 W. R. 307; *Re Hutchinson*, 14 W. R. 473; *Re Hurle's Settled Estate*, 2 H. & M. 196; but an order may be made "subject to, and so as not to affect the rights, estate and interest of any person whose consent has been refused or cannot be obtained," *Re Legge*, 6 W. R. 20; *Re Parry*, 34 Beav. 462; and see *Re Tarbutt*, 8 L. T. N. S. 603, where the consent of a lunatic, not so found by inquisition, was dispensed with.

As to re-investment of the proceeds arising from the sale, *Wall v. Hall*, 11 W. R. 298; *Re Sexton Barnes' Settled Estate*, 10 W. R. 416.

As to costs, see *Re Parby's Settlement*, 29 L. T. 72; *Re Marner*, 3 L. R. Eq. 432.

The Imp. Act 18 & 19 Vic. c. 43, is that which enables minors in England, to make binding settlements of their real and personal estate on marriage. Under this Act it has been held that the Act does not impose on the Court any duty of enquiring as to the propriety of the marriage, but that it can consider the propriety of the settlement only, *Re Dalton*, 3 Sm. & G. 331; 6 D. M. & G. 201; where the lady's portion was considerable the Court referred the whole matter to Chambers, *Re Olive*, 11 W. R. 819. The Act extends to post nuptial settlements, *Re Hoare*, 11 W. R. 181; *Powell v. Oakley*, 34 Beav. 575; but the Court cannot approve

a settlement originally made without its concurrence, *Re Fuller*, 1860.

A petition is necessary though a suit is pending, *Pearth v Marriott*, 1 W. N. 48.

The jurisdiction of the Court in England, as to special cases depends upon the Imp. Act 13 & 14 Vic. c. 35. By that Act a husband interested in right of his wife in any question, may concur in a special case in his own name and in the name of his wife, where she has no claim to an interest distinct from her husband, and where a married woman has such distinct interest she may concur in her own right, provided her husband concurs also. The Committee of a lunatic must obtain authority from the Court before he can concur.

An application for a guardian *ad litem*, or for a special guardian, on behalf of an infant, for the purpose of concurring in a special case, should be made by motion, *Re Goodfellow*, 1 W. R. 446; and need not be by a next friend; and should be supported by an affidavit of the fitness of the proposed guardian, *Ex parte Craig*, 15 Jur. 762.

The father of the infant being a party to the special case and having no adverse interest, it was held not necessary to appoint a guardian *ad litem*, *Ellis v. Guilton*, 18 L. T. 266; but the interest of the infant should at the hearing be protected by separate Counsel, *Wright v. Woodham*, 17 L. T. 293.

The affidavit should be styled "In the matter of the infant," and "In the matter of the Act," *Star v. Newberry*, 20 Beav. 14; not "In the special case, &c.," *Maddison v. Skein*, 6 L. T. N. S. 20.

A special case may be amended, *Thislethwaite v. Garnier*, 5 De G. & Sm. 73; where it had been set down for hearing, *Domville v. Lamb*, 9 Hare App. 55; and even at the hearing, *Belt v. Cade*, 2 J. & H. 122; and it may on abatement be revived, *Wilson v. Whateley*, 1 J. & H. 331; *Ainsworth v. Alman*, 14 Beav. 597.

Generally the Court will only give its opinion on questions of construction, and not bind the rights of parties, *Bailey v. Collatt*, 23 L. J. Ch. 230.

As to what the Court will or will not decide on a special case, see *Schroder v. Schroder*, Kay 578; *Evans v. Saunders*, 1 Drew. 415, 654; *Day v. Day*, 18 Jur. 1013; *Leslie v. Thompson*, 9 Hare 268; *Wilson v. Bennett*, 20 L. J. Ch. 279; *Edwards v. Milbank*, 4 Drew. 606; *Bell v. Cade*, 2 J. & H. 122; *Earl of Tyrone v. Marquis of Waterford*, 1 D. F. & J. 618.

II. The Court shall have the same equitable jurisdiction in matters of revenue as the Court of Exchequer in England possesses.

Before the passing of this Act it was held that the Court did not possess such jurisdiction, *Miller v. Atty.-Gen.*, 9 Grant, 558.

As to the equitable jurisdiction possessed by the Court of Exchequer in England, in revenue matters, see 33 *Hen. 8*, c. 39, s. 79; *Atty.-Gen. v. Halling*, 15 M. & W. 687; *Ex parte Colebrooke*, 7 Price, 87; *Colebrooke v. Atty.-Gen.*, 7 Price, 148; *Manning's Exch. Pr.*, 101.

III. In all cases in which the Court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, the Court, if it thinks fit, may award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be ascertained in such manner as the Court may direct, or the Court may grant such other relief as it may deem just.

The question of damages will not be entertained, except in cases where the Court has jurisdiction irrespective of any right to them, *Durell v. Pritchard*, 1 L. R. Ch. 244; *Hindley v. Emery*, 1 L. R. Eq. 52; *Lewers v. Earl of Shaftesbury*, 2 L. R. Eq. 270; *Wedmore v. Corporation of Bristol*, 11 W. R. 136; *Swaine v. Great Northern Rail. Co.*, 12 W. R. 391. If the jurisdiction existed at the time of filing the bill, the Court will entertain the question of damages, though something occurs during the litigation which prevents the jurisdiction attaching at the hearing, *Davenport v. Rylands*, 1 L. R. Eq. 302; *Eastwood v. Lewis*, 33 L. J. Ch. 355; *Cory v. Thames Iron Co.*, 11 W. R. 589.

An inquiry as to damages sustained by infringement of a patent, will not be given where an issue as to damages was not submitted to the jury, which in the same suit tried the validity of the patent, *Needham v. Ozley*, 2 N. R. 388.

The Court may, and in some cases does, grant damages in substitution for other relief, as the more appropriate remedy, *Senior v. Pawson*, 3 L. R. Eq. 380; *Martin v. Headon*, 2 L. R. Eq. 425; *Durell v. Pritchard*, 1 L. R. Ch. 244; *Hawe v. Hunt*, 31 Beav. 420; *Franklin v. Ball*, 33 Beav. 560; *Cotton v. Wyld*, 32 Beav. 266; *Tillett v. Charing Cross Rail. Co.*, 26 Beav. 419.

If the plaintiff does any act which disentitles him to specific performance of the agreement, he will not be entitled to damages, *Collier v. Stuteley*, 7 W. R. 710; *Bauman v. Matthews*, 4 L. T. N. S. 784; so if the injury complained of is trivial, *Clarke v. Clarke*, 1 L. R. Ch. 16; *Curtis' Co. v. Corbett*, 13 W. R. 1056; but in such a case the dismissal of

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the bill will be without prejudice to the plaintiff's right to bring an action at law, *Robson v. Whittingham*, 1 L. R. Ch. 442.

Where the agreement is uncertain, damages will not be given, *Lancaster v. De Trafford*, 10 W. R. 474; *Darby v. Whittaker*, 4 Drew. 134.

Damages may be granted though not prayed by the bill, *Curriers' Co. v. Corbett*, 2 Dr. & Sm. 355; *Calton v. Wyld*, 32 Beav. 266.

For form of decree directing special enquiry as to damages, see *Midleton v. Greenwood*, 3 W. R. 150.

On an application for an injunction the Court always now requires the plaintiff to give an undertaking as to damages. The undertaking should be inserted in the order for the injunction in these words: "And the plaintiff, by his Counsel, undertaking to abide by any order the Court may make as to damages, in case this Court should hereafter be of opinion that the defendant shall have sustained any, by reason of the order which the plaintiff ought to pay." An order directing an inquiry as to damages may be obtained after a decree dismissing the bill, *Newby v. Harrison*, 7 Jur. N. S. 981; *Coy v. Henderson*, Chambers.

IV. An Order or Decree for alimony may be registered in any Registry Office in Upper Canada, and such registration shall, so long as the Order or Decree registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the County or Counties where such Registration is made, and operate thereon for the amount or amounts by such Order or Decree ordered to be paid in the same manner and with the same effect as the Registration of a charge of a life annuity, created by the defendant on his lands would; and such Registration may be effected through a certificate by the Registrar of the Court of such Order or Decree.

V. Where a commission of lunacy would have been heretofore necessary or proper, the Court in lieu thereof may, with or without the aid of a Jury (which the Court or a Judge thereof may cause to be empanelled as in other cases) hear evidence and enquire into and determine upon the alleged lunacy, provided that the alleged lunatic shall have a right in such cases to demand that the inquiry be submitted to a jury, or the Court may order that the enquiry be had before any Court of Record,

and every such inquiry, whether under a commission of lunacy, or before any such Court of Record, shall be confined to the question, whether or not the person who is the subject of the inquiry, is at the time of such inquiry of unsound mind or incapable of managing himself or his affairs, and the verdict rendered by a Jury shall in every case be returned unto the Court, certified by the Judge before whom the inquiry has been had, and shall be final as to the question on such inquiry, unless the same be set aside.

By the Imp. Act 25 & 26 Vic. c. 86, s. 3, no evidence as to anything done or said by the supposed lunatic, or as to his demeanour or state of mind at any time being more than two years before the time of the inquiry, shall be received in proof of insanity on any such inquiry, or on any traverse of an inquisition, unless the Court shall otherwise direct.

Where on an application in lunacy the Court ordered the Sheriff to empanel a Jury, for the then next sittings of the Court, and the matter was not proceeded with until the sittings succeeding the next, it was held that the panel was not properly constituted, and that the Sheriff's authority to summon a Jury was confined to the first sittings after the date of the order, *Re McNulty*, 13 Grant, 463; an alleged lunatic should receive the same notice of a trial before the Court, as on an inquisition under the former practice, *Ibid*.

VI. Where any such inquiry is had by the Court, with or without the aid of a Jury or before a Court of Record, no traverse shall be allowed, but the Court, if dissatisfied with the finding of a Jury, may, at the instance of any party who would be entitled to traverse an inquisition under commission of lunacy, direct a new trial or new trials from time to time upon application therefor made to the Court within three months from the time the verdict is rendered, or such further time as the Court, under special circumstances, may permit, and subject to such directions and upon such conditions as to the Court may seem proper, and the Court may order any such new trial to be had before the same Court in which the verdict was rendered or before any other Court.

See notes to Con. Stat. U. C. c. 12, ss. 34 & 35.

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VII. On every such inquiry, the alleged lunatic, if he be within the jurisdiction of the Court, shall be produced and shall be examined at such times and in such manner either in open Court or privately before the Jury shall retire to consult about their verdict, as the presiding Judge may direct, unless the Court ordering such inquiry shall beforehand by order have dispensed with such examination.

By the Imp. Stat. 23 & 26, Vic. c. 86, s. 6, the alleged insane person is to be examined before the taking of the evidence is commenced, and at the close of the proceedings, before the jury consult as to their verdict, unless the presiding Judge otherwise direct.

As to the inspection of the alleged lunatic by the jury, see *Re Smith* 1 Swan, 4; *Ex parte Southcote*, Ambler, 109.

A lunatic taken out of the jurisdiction, may be directed to be brought back for the purpose of the inquiry, *Re Wykeham*, 1 T. & R. 537.

VIII. Any order by a single Judge in a matter of lunacy, shall be subject to rehearing before the full Court, and any order of the full Court shall be subject to an appeal to the Court of Error and Appeal respectively within the same times and under the same conditions as in other cases in the said Court of Chancery, unless the said Court or a Judge thereof, shall otherwise order.

Under this section the practice as to appealing in lunacy matters seems to differ from that in ordinary suits. By Con. Stat. U. C., c. 12, s. 22, decrees and orders made by a single Judge have the force and effect of, and are deemed for all purposes to be, decrees and orders of the Court; so that a decree made by a single Judge need not be reheard, but may be carried direct to the Court of Error and Appeal. In lunacy, rehearing seems necessary before going to the Court of Error and Appeal.

IX. The Court may order the costs, charges and expenses of and incidental to the presentation of any petition for a commission of lunacy or any inquiry, inquiry, issue, traverse, or other proceeding in lunacy, to be paid either by the party or parties presenting such petition or prosecuting the same or such inquiry or other proceeding in lunacy, or by the party or parties opposing

the same, or out of the estate of the alleged lunatic, or partly in one way and partly in another.

Where the jury found a verdict of lunacy and the alleged lunatic had so conducted himself as to afford grounds for the application against him, the Court, while quashing the inquisition, refused to charge the party applying for the commission with the costs, *Re Milne*, 11 Grant 187; and where the enquiry ended in a verdict of sanity, the Court, considering that upon the whole evidence there was reasonable ground for questioning the sanity, refused to order the applicants for the enquiry to pay the costs of the alleged lunatic, *Re Windham*, 8 Jur. N. S. 448; 31 L. J., N. S. Ch. 720; see as to costs, *Re Loveday*, 1 D. M. & G. 275; *Ex parte Glover*, 1 Mer. 269; *Ex parte Ferns*, 5 Ves. 882.

Where the wife of an alleged lunatic presented a petition praying an enquiry as to his state of mind, which was ordered to stand over, and in the meantime the husband recovered, the costs of the petition were ordered to be paid out of the lunatic's estate, *Re F.* 33 L. J. N. S. 333.

X. The seventy-third section of the said Act is amended by inserting therein immediately after the words "*sui juris*" the words "*or non compos mentis.*"

XI. The Court shall have the same powers of regulating the practice in matters of lunacy and in all matters under this Act as in other cases within the jurisdiction of the Court.

XII. Where a defendant or respondent in any suit or matter is absent from the Province or cannot be found therein to be served, the Court may authorize proceedings to be taken against him according to the practice of the Court in the case of a defendant, whose residence is unknown, or in any other manner that may be provided or ordered, if the Court shall, under the circumstances of the case, deem such mode of proceeding conducive to the ends of justice.

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29TH VIC. CAP. XXV.—AN ACT FOR QUIETING
TITLES TO REAL ESTATE IN UPPER CANADA.

WHEREAS it is expedient to give certainty to the title to real estate, in Upper Canada, and to facilitate the proof thereof; and also to render the dealing with land more simple and economical: Therefore, Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. Any owner of an estate in fee simple in land in Upper Canada, or any trustee for the sale of the fee simple, shall be entitled to have his title judicially investigated and the validity thereof ascertained and declared; and he shall be so entitled whether he has the legal estate or not, and whether his title is subject or not to any charges or incumbrances.

The principal objects sought to be attained by this Act, are the giving greater certainty to titles, and by facilitating the proof of them to render the dealing with land simple and less expensive. As the law stood before the passing of this Act, an owner of land might have an indisputable title, every link in the chain of which he could easily prove, but he had no certainty that when years after he might be called upon to prove his title, he could do so. Title deeds might in the meantime be lost, or accidentally destroyed, witnesses might die, or important facts might have escaped from their memories. Even if his title was in any way attacked, he had in most cases only an opportunity of shewing his legal title. In an action at law, questions of the equitable title or of equitable interests in the property are rarely touched, and whatever the result of the action may be, it is binding only upon the parties to the action. If repeated actions are brought, the same steps have to be gone through, and the same evidence adduced in each action.

Besides, many of the defects in a title are such that if known of in time, they can easily be remedied, but are incurable after the lapse of some years. The original parties to the transaction may be dead, and their heirs, minors or unknown, so that confirmation deeds cannot be got. Or those who are in a position to take advantage of the defect, may be tempted to do so, by a rise in the value of the property.

This Act is intended to remedy these evils as far as possible, by permitting any owner of land to have his title submitted to judicial investiga-

tion, and adjudicated upon, even though no hostile claim is being made.

When the owner has established his title, after due enquiry and every precaution on the part of the Court against error or fraud, he is to be entitled to a certificate, which is to be conclusive against every person, that at its date the person named in it was the owner of the property, and which is intended to be a new starting point for his title.

By this means, in the case of every person who has the wisdom to take advantage of the Act, the dealing with his property will be a matter of great simplicity.

Where a certificate of title has been obtained under this Act, many of the questions arising on every title will be avoided. An intending purchaser need not enquire into the genuineness of the various deeds, or as to their due execution; all doubt as to the sufficiency of any will forming a link in the title, or the capacity of the testator when he executed it, will be set at rest. Where married women have been the grantors, there will be no need for enquiry as to whether they were duly examined as required by law, and certificates of the fact in due form endorsed on the deeds. He knows that these and all similar questions have been submitted to a close and careful scrutiny, and satisfactorily established.

All reasonable precautions are provided by the Act to prevent the possibility of injustice. Before a certificate of indefeasible title is granted, the Court is to make, either itself or by a competent officer acting under the supervision of a Judge, a thorough examination of all the deeds and evidences of title which are in the possession or power of the petitioner; the Registry office must be carefully searched, and copies of all memorials relating to deeds, the originals of which cannot be found, must be produced. The petitioner must make an affidavit that he knows of no adverse claim, and his solicitor or counsel must certify that he has examined the title and conferred with the applicant, and that he believes the title to be a good one, and the affidavit true.

Notice of the application is also to be given, not only to any one who may appear to have an adverse claim, but to any one the Judge may think should have notice of the proceedings. Notice is also to be published in the Gazette, and other Newspapers, so that if there is any claimant, whose title does not appear on Registry nor in the deeds, and who is unknown to the petitioner or his advisers, he may, if possible have notice of what is going on, and have an opportunity of asserting his rights.

Where a petitioner in proceeding under this Act, makes out his title satisfactorily, he is entitled to a certificate unless the title can be successfully impeached at law or in equity; and if a bill filed by the contestant impeaching the transaction, by which the claimant's title arose, could be successfully resisted by claimant on any ground, it will form no obstacle to a certificate being granted to the claimant, *Laing v. Matthews*, 14 Gr. 36.

If the opposing claim is such that had a bill been filed by the party entitled to enforce it, the claimant would have had a good defence as a

bona fide purchaser to a certificate

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bona fide purchaser for value, without notice, the claimant will be entitled to a certificate of title, *Cochrane v. Johnston*, s. 14 Gr. 177.

II. Any other person who has any estate or interest, legal or equitable, in or out of land in Upper Canada, may also apply for the investigation of his title and a declaration of the validity thereof; but it shall be in the discretion of the Judge by or before whom the proceedings are taken, to grant or refuse the application for the investigation; and such discretion may be invoked and exercised at any stage of the proceedings, and the decision of the Judge in exercising such discretion shall be subject to appeal like any other decision.

III. The application shall be to the Court of Chancery or any Judge thereof, and may be by a short petition in the form given in Schedule A.

The solicitor should carefully and thoroughly investigate the title, and the evidence which can be adduced in support of it before filing the petition. If on such investigation he discovers an insurmountable defect, or that the evidence on any material point is unattainable, he should not file the petition, as the registration of a petition as required by the Act, without any certificate following it, will form a cloud upon the title. When the solicitor has examined the title and found it perfect, he should prepare the petition, following the form given by the Act, which should strictly be followed, and varied only in special cases.

The filing of a petition is not such a proceeding as will save the rights of a party contestant, otherwise barred by the Statute of Limitations, *Laing v. Avery*, 14 Gr. 83.

IV. A certificate by the Registrar of the said Court, of the petition being filed, shall be registered in the Registry Office of the County in which the land lies, and this certificate may be in the form given in Schedule B.

V. The application shall be supported by the following particulars:

1. The title deeds (if any) and evidences of title re-

lating to the land that are in the possession or power of the applicant ;

2. A certified copy of the memorials of all other registered instruments affecting the land, or of all since the last judicial certificate, if any under this Act, was given (as the case may be), up to the time of the registering of a certificate of the petition as provided for by section four ;

3. The certificate of the Registrar of the County in which the land lies, as to bills and proceedings in Chancery or in any County Court on its equity side, relating to the land, and of which a certificate has been registered in his office ;

4. A concise statement of such facts as are necessary to make out the title, and which do not appear in the produced documents ; but no abstract of produced documents shall be required, except on special grounds ;

5. Proofs of any facts which are required to be proved in order to make out the title, and which are not established by the other produced documents, unless the Judge shall dispense with such proofs until a future stage of the investigation ;

6. An affidavit or deposition by the person whose title is to be investigated and a certificate of one of his Counsel or Solicitors, to the effect hereinafter respectively mentioned, unless the Judge sees fit, for some special reason, to dispense with the same respectively ;

7. A Schedule of the particulars produced under the preceding six subsections.

The solicitor should, before any proofs are laid before the Master or other Referee, obtain all the necessary affidavits proving possession of the land to have gone with the ownership, the heirship of parties claim-

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ing by descent, the death of parties entitled to dower, or tenancy by the curtesy, that the land is not chargeable with any Crown debts, or with certain debts only, that all taxes on the land have been paid up to the first of January next preceding the filing of the petition, that there are no writs of execution in the Sheriff's hands against any person interested in the land, and that the land has not been sold for taxes within eighteen months preceding the filing of the petition, or under execution within six months preceding.

Where the Registrar is unable, from the description of the property, to certify that the memorials mentioned are all that affect the land, a Surveyor or other competent person should examine the property, and after examining the Registry books, should make an affidavit that the memorials produced are all those that affect the land.

Where the deeds are lost or cannot be produced, the same evidence of their loss and contents must be given as on a trial at law, before secondary evidence can be received.

Where title is derived through Sheriff's sale under an execution, the affidavit should state the volume and page of the Gazette, and the names and dates of the local Newspapers, in which the advertisements appeared; and where the title is derived through a Sheriff's sale for taxes, the affidavit must shew that all the requirements of the Statute have been strictly complied with.

By evidences of title, in the first clause, is meant especially written documents other than title deeds; not proofs of facts, which are provided for by clause five.

Where a deed is executed under a power of attorney, the power of attorney must be produced, or secondary evidence of it given, as in the case of any other title deed, and evidence should be furnished that at the time when the power was acted upon, the owner was alive; except in cases coming under the 29 Vic. c. 28, ss. 23, 24.

Clause two shews that until the certificate of filing the petition is registered, the particulars to support the application cannot be delivered to the Referee, for prior to the registering the certificate a certified copy of all memorials "up to the time of registering the certificate" cannot be procured.

If a petitioner intends to use certified copies of memorials as evidence, he must also procure and produce certified copies of the affidavits of execution.

The concise statement of facts spoken of in clause four, is intended to to embrace all facts necessary to make out the title, and which do not appear on the documents produced—as title by length of possession, deaths, descents, &c., dates being given in all cases where possible.

(The proof of facts referred to in clause five, such as length of possession, marriages, deaths, loss of deeds, searches for them and their contents,

should accompany the deeds when delivered to the Referee, unless *viva voce* evidence has to be given.

Where the wife of a grantor does not join in a conveyance, evidence should be given that the grantor was unmarried, or that dower is barred by time or otherwise.

The word Judge, in sub-section 6, includes Referee, see secs. 25, 52.

VI. The affidavit or deposition of the person whose title is to be investigated, shall state to the effect, that to the best of his knowledge and belief he is the owner of the estate or interest (whatever it is) which is claimed by the petition, subject only to the charges and incumbrances set forth in the petition or in the schedule thereto, or that there is no charge or incumbrance affecting the land; that the deeds and evidences of title which he produces, and of which a list is contained in the Schedule produced under the preceding section, are all the title deeds and evidences of title relating to the land that are in his possession or power, and that he is not aware of the existence of any claim adverse to or inconsistent with his own to any part of the land or to any interest therein, or if he is aware of such adverse claim, he shall set forth every such adverse claim, and shall depose that he is not aware of any except what he sets forth; and the affidavit or deposition shall also set forth whether any one is in possession of the land, and under what claim, right or title; and shall state that to the best of the deponent's knowledge, information and belief, the said affidavit or deposition, and the other papers produced therewith, fully and fairly disclose all facts material to the title claimed by the Petitioner, and all contracts and dealings which affect the same or any part thereof, or give any right as against the applicant.

If there is more than one petitioner, all should join in the affidavit, or some reason be assigned why they do not.

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son instead of the person whose title is to be investigated, or an affidavit or deposition as to part may be made by the one, and as to part by another, at the discretion of the Judge to whom the application is made; and in such case, the affidavit shall be modified accordingly.

See sections 25 & 52 as to the powers of a Referee.

VIII. The certificate of the Counsel or Solicitor shall state to the effect, that he has investigated the title and believes the party to be the owner of the estate which the petition claims in the land in question, subject only (if such be the case) to any charges or incumbrances that may be set forth in the Schedule to the petition; or that he so believes, subject to any condition, qualification or exemption to be set forth in the certificate), and that he has conferred with the deponent on the subject of the various matters set forth in the affidavit or deposition referred to in the preceding two sections, and believes the affidavit or deposition to be true.

IX. The Judge in investigating the title may receive and act upon any evidence that is now received by any of the Courts on a question of title; and any evidence which the practice of English Conveyancers authorizes to be received on an investigation of a title out of Court; or any other evidence, whether the same be or be not receivable or sufficient in point of strict law, or according to the practice of the English Conveyancers, provided the same satisfies the Judge of the truth of the facts intended to be made out thereby.

As a general rule the evidence should include not only what a purchaser's solicitor would satisfy himself of by search and enquiry according to the rules laid down by Conveyancers, but also what is necessary for a vendor to produce to a purchaser on a strict investigation of title. Higher evidence is necessary than such as would merely prevail in ejectment. There are erroneous judgments upon defective or unsound evidence which may be cured by another ejectment; but if the doubts upon

a title should after completion ripen into defects, the purchaser may find it impossible to regain the position which he held before the contract. Thus a seven years' absence without tidings, though it prevails as evidence of death in ejectment, is clearly insufficient between vendor and purchaser, that the title is good against all the world, and not merely sufficient to prevail against certain contending parties.

A vendor may therefore be required to furnish evidence which would be elicited by adverse proceedings, to prove or disprove facts, which, if he were a party litigant, it would be the business of his opponent to negative or establish.

Where there is any doubt whether some person other than the petitioner may not be interested in the property, notice should be given; and the same should be done where the title is not a clear paper title, proved by the production of the original deeds.

If the purchaser's title rests on the Statute of Limitations, notice should be given to the person said to be barred, as in various ways, as by acknowledgment of title, the effect of the statute may be defeated.

So where secondary evidence is given by production of a memorial and affidavit of execution, if the memorial is not in full and not signed by the grantor, notice should be given to the grantee.

In the case of a title derived under a sale for taxes, the person who but for the sale would be the owner, should have notice of the proceedings, and as a general rule, where the registry shews a conveyance from a person, through whom the petitioner does not claim, and who on registry has no apparent title, notice should be given to the grantee.

The Referee must, however, in giving notice, exercise a discretion, to avoid, on the one hand, doing injustice to some person probably interested, and on the other hand putting the petitioner to unnecessary expense.

The Referee has the same powers as a Judge, see secs. 25 & 52.

X. The proofs required may be by, or in the form of, affidavits or certificates; or may be given *viva voce*; or may be in any other manner or form that under the circumstances of the case is satisfactory to the Judge in regard to the matters to which the same relate.

Frequently title deeds are lost or destroyed, and the party claiming under them is desirous of giving secondary evidence of their contents, and in such a case, before this secondary evidence can be received, evidence of search in the proper quarter and proof of their destruction must be given. It is always important, and sometimes essential, to shew that possession has gone with the deeds.

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Where the patent is not produced, an exemplification or a certified copy must be got.

XI. If the Judge is not satisfied with the evidence of title produced in the first instance, he shall give a reasonable opportunity of producing further evidence, or of removing defects in the evidence produced.

XII. Before giving a certificate or conveyance under this Act, the Judge shall direct to be published in the *Canada Gazette*, and if he sees fit in any other newspaper or newspapers, and in such form and for such period or periods as the Judge thinks expedient, a notice either of the application being made, or of the order or decision of the Judge thereon; and the certificate or conveyance shall not be signed or executed until after the expiration of at least four weeks from the first publication of such notice, or such other period as the Judge may appoint.

XIII. When the Judge is satisfied respecting the title, and considers that the certificate of title can safely be granted without any other notice of application than the published notice so required, he shall grant the certificate accordingly.

Where a Referee finds in favour of a title acquired by adverse possession, against the legal paper title, his certificate should shew of what portion of the lot the claimant has been in possession; as by occupation of one or more acres of a wild lot of land, a party will not acquire title to the whole lot, but only to so much as he is in actual possession of, *Low v. Morrison*, 14 Gr. 192.

As to the duty of the Referee, see Ord. 503, 504.

XIV. In case of there appearing to exist any claim adverse to or inconsistent with that of the Petitioner to or in respect of any part of the land, the Judge shall direct such notice as he deems necessary to be mailed to or served on the adverse claimant, his solicitor, attorney, or agent.

The word Judge includes Referee.

XV. In all cases he may require from time to time any further publication to take place, or any other notice to be mailed or served, that he deems necessary before granting his certificate.

XVI. Before a certificate of title is granted, satisfactory evidence shall be given by certificate, affidavit or otherwise, that all taxes, rates and assessments, for which the land is liable, have been paid, or that all except those for the current year have been paid.

XVII. Every claim of title under this Act shall be presumed to be subject to the following exceptions and qualifications, unless the petition for investigation expressly alleges the contrary :

1. The reservations (if any) contained in the original grant from the Crown ;

2. Any municipal charges, rates or assessments theretofore imposed for local improvements, and not yet due and payable ;

3. Any title or lien which, by possession or improvement or other means, the owner or any person interested in any adjoining land has acquired to or in respect of the land mentioned in the certificate ;

4. Any lease or agreement for a lease, for a period yet to run, of not exceeding three years, where there is actual occupation under the same.

XVIII. But if the applicant desires the certificate to declare the title to be free from the said particulars, or any of them, his petition shall so state, and the investigation shall proceed accordingly.

XIX. Any person having an adverse claim, or a claim not recognized in the applicant's petition, may at any

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time before the certificate of title is granted, file and serve on the applicant, his solicitor or agent, a short statement of his claim, which may be in the form set forth in Schedule C.

XX. This claim shall be verified by an affidavit to be filed therewith.

XXI. In case of a contest, the Judge may either decide the question of title on the evidence before him, or may refer the same or any matter involved therein to the full Court, or to any mode of investigation which is usual in other cases, or which he may deem expedient, and may defer granting the certificate until afterwards, according as the circumstances of each case render just or expedient.

Where the contestant having filed his claim verified by affidavit, and complied with the requirements of sections 19 & 20, does not take an appointment to proceed thereon, the petitioner ought to obtain a warrant from the Referee, on the return of which the Referee will regulate the course of proceeding and appoint a time for the claimant to proceed with the consideration of his title, and for the contestant to bring in and proceed upon his objections.

At the time appointed the necessary evidence is to be adduced and the questions at issue argued.

XXII. The Judge may, at any stage of the cause, order security for costs to be given by the applicant for a certificate, or by any person making any adverse claim.

A contestant, served with notice, will not be prevented from asserting his rights until payment of costs of proceedings instituted by him against the claimant, in respect of the property in question, ordered to be paid by the contestant, *Shepherd v. Hayball*, 13 Gr. 681.

A Referee has the same power.

XXIII. The Judge may order costs either as between party and party, or as between solicitor and client, to be paid by or to any person, party to any proceeding under

this Act, and may give directions as to the fund out of which any costs shall be paid.

See secs. 25 & 52, as to the powers of the Referee.

Costs do not follow as a matter of course on proceedings under this Act, *Low v. Morrison*, 14 Gr. 192; where a party having acquired title by adverse possession, institutes proceedings to quiet his title, he must establish his right at his own expense; and although such adverse title is established, he may be made to pay the costs of an unsuccessful contestant, *Ibid*.

XXIV. The Petitioner may by leave of the Judge withdraw his application at any time before final adjudication, on payment of all costs incurred in the investigation either by himself or by any adverse claimant.

XXV. With a view of expediting investigations, and subject to any general orders in this behalf, the Judge, if he sees fit, may refer any petition presented under this Act to the Master or a Deputy Master or any other officer of the said Court, or to any Counsel named by the Judge, and in such case the referee shall proceed as the Judge himself should do under this Act, had the reference not been made, and shall have the same powers.

See Ord. 494, for the officers to whom petitions may be referred.

XXVI. The Judge may also refer any title to counsel named by the Judge, for a preliminary report or examination, and may call for the assistance of counsel, in any other way and for any other purpose that may tend to the despatch of business under this Act.

XXVII. The Judge may give one Certificate of title, comprising all the land mentioned in the Petition, or may give separate Certificates as to the title of separate parts of the land.

XXVIII. The certificate of title may be in the form contained in Schedule D to this Act, and shall be under

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the seal of the Court, and shall be signed by one of the Judges and by the Registrar of the Court, and the same and the Schedule (if any) thereto, or a duplicate or counterpart of the same, shall be registered in full, both in the Court of Chancery and in the Books of the Registry Office of the County where the land lies, without any further proof thereof.

XXIX. A memorandum or certificate of the registration may be endorsed on the certificate of title or on any counterpart or certified copy thereof thus :—

“Registered in Chancery, 186 , Book
 , Page , A. G. Registrar.

Registered in the Registry Office for the County of
 , Book , Page , (Date) Registrar,”
 and a memorandum or certificate so signed shall be evidence of the registration mentioned therein.

XXX. The certificate of title when so sealed, signed and registered, shall be conclusive at law and in equity, and the title therein mentioned shall be deemed absolute and indefeasible, from the day of the date of the certificate, as regards Her Majesty and all persons whatever, subject only to any charges or incumbrances, exceptions or qualifications mentioned therein, or in the Schedule thereto, and shall be conclusive evidence that every application, notice, publication, proceedings, consent and act whatsoever, which ought to have been made given and done previously to the granting of the certificate, has been made, given and done by the proper parties.

XXXI. After a certificate of title is duly registered, a copy of the certificate, purporting to be signed and certified as such copy, by the Registrar in Chancery, or by the Registrar for the County in which the land lies, shall be admissible evidence of the certificate for all purposes

whatsoever, without further evidence of such copy, and without accounting for the non-production of the certificate.

XXXII. In case of a Chancery sale, the Court of Chancery, if it thinks fit, may investigate the title with a view to granting an indefeasible title, and in that case, a conveyance executed to the purchaser under the seal of the Court and purporting to be under the authority of this Act, shall have the same conclusive effect as a certificate.

XXXIII. The conveyance may be in the form set forth in Schedule E to this Act.

XXXIV. Where a decree is made for the specific performance of a contract for the sale of an estate, and it is part of the contract that the vendor shall have an indefeasible title, the Court shall make the like investigation, and the conveyance may be in the form set forth in the same Schedule E.

XXXV. In case any person domiciled in Upper Canada, or claiming any real estate in Upper Canada, desires to establish, not his title to some specific property, but generally that he is the legitimate child of his parents, or that the marriage of his father and mother, or of his grandfather and grandmother, was a valid marriage, or that his own marriage was a valid marriage, or that he is the heir, or one of the co-heirs of any person deceased, or that he is a natural born subject of Her Majesty, he may, if the said Court thinks fit, have any of the said matters judicially investigated and declared.

XXXVI. The application may be by a short petition stating the object of the application.

XXXVII. The petition shall be supported by an affidavit of the applicant verifying the statements of the petition,

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and stating further that his claim is not disputed or questioned by any person ; or if his claim is to his knowledge disputed or questioned, he shall set forth the facts in relation to such dispute or question, and shall depose that he is not aware of any dispute or question except what he has set forth, and he shall state in the affidavit such other facts as may satisfy the Court of the propriety of proceeding with the investigation.

XXXVIII. The investigation shall be made by the same judicial authority, and in the same manner, and on the same evidence, and the same publication or other notice shall be required, and the same proceedings generally shall be had, and the certificate granted on such investigation shall be registered in the same way, and may be proved by the same evidence, as nearly as may be respectively, as in cases under the first section of this Act.

XXXIX. This certificate when registered shall be conclusive and indefeasible in favor of the party on whose application the same was granted, and all persons claiming by, from, through or under him, and shall be *prima facie* evidence in favor of all other persons, and against all persons of the truth of the fact therein declared.

XL. A separate book shall be kept in Chancery for the registering of these and other certificates of title, and conveyances given under this Act, and the certificates and conveyances registered therein shall be numbered in order, and convenient indexes to the book shall be kept in such form as the Court from time to time directs.

XLI. In case any person who, if not under disability, might have made any application, given any consent, or done any act, or been party to any proceeding under this Act, is a minor, an idiot or a lunatic, the guardian of the minor, or committee of the estate of an idiot or lunatic, may make such application, give such consent, do such

act and be party to such proceeding as such person might, if free from disability, have made, given, done or been party to, and shall otherwise represent such person for the purposes of this Act; and if the minor has no guardian, or the idiot or lunatic no committee of his estate, the Court or Judge may appoint a person with like power to act for the minor, idiot or lunatic; but a married woman shall, for the purposes of this Act, be deemed a feme-sole.

XLII. After a certificate is granted in regard to any of the matters investigated under this Act, any party aggrieved thereby may, on petition, and after satisfactorily accounting for his delay, have the title or claim re-investigated on such terms as may be just.

XLIII. But no proceeding on such petition shall affect the title of any person who, in the meantime, and after the registration of the certificate, shall have acquired, by sale, mortgage or contract, for valuable consideration, any estate or interest in the land specified in the certificate of title; or (in case the certificate was under the thirty-fifth section of this Act,) in any land or other property, the title to which was derived from, through or under the person named in the certificate, in the character which is thereby declared to belong to him.

XLIV. Proceedings under this Act shall not abate or be suspended by any death or transmission or change of interest, but in any such event the Court or Judge may require notices to be given to persons becoming interested, or may make any order for discontinuing, or suspending, or carrying on the proceedings, or otherwise in relation thereto, as under the circumstances may be just.

XLV. No petition, order, affidavit, certificate, registration or other proceeding under this Act shall be invalid by reason of any informality or technical irregularity

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therein, or of any mistake not affecting the substantial justice of the proceeding.

XLVI. An appeal shall lie from any order or decision of a Judge under this Act to the full Court, and from the full Court to the Court of Error and Appeals, as in the case of Orders, Decrees, Rules and Judgments, in suits.

An appeal to a Judge lies from the order of the Referee.

XLVII. The foregoing provisions of this Act shall be so construed and carried out, as to facilitate, as much as possible, the obtaining of indefeasible titles by the owners of estates in land, through the simplest machinery, at the smallest expense, and in the shortest time, consistent with reasonable prudence in reference to the rights or claims of other persons.

XLVIII. If in the course of any proceeding under this Act, any person acting either as principal or agent, shall, knowingly and with intent to deceive, make, or assist or join in or be privy to the making of, any material false statement or representation, or suppress, conceal or assist or join in or be privy to the suppressing, withholding or concealing from the Court any material document, fact or matter of information, every person so acting shall be deemed to be guilty of a misdemeanor, and on conviction shall be liable to be imprisoned in the Provincial Penitentiary for a term not exceeding three years, and not less than two years, or to be imprisoned in any other prison or place of confinement for any term less than two years, and in the latter case with or without hard labor, or to be fined such sum as the Court by which he is convicted shall award; any order or declaration of title obtained by means of such fraud or falsehood, shall be null and void for or against all persons other than a purchaser for valuable consideration without notice.

QUIETING TITLES ACT.

XLIX. If in the course of any proceeding before the Court, under this Act, any person shall fraudulently forge or alter, or assist in forging or altering, any certificate or other document relating to such land or the title thereto, or shall fraudulently offer, utter, dispose of or put off any such certificate or other document, knowing the same to be forged or altered, such person shall be guilty of felony, and upon conviction shall be liable, at the discretion of the Court by which he is convicted, to be imprisoned in the Provincial Penitentiary for life, or for any term not less than three years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years, and in the latter case with or without hard labor.

L. No proceeding or conviction for any act hereby declared to be a misdemeanor, shall affect any remedy which any person aggrieved by such act may be entitled to, either at law or in equity, against the person who has committed such act.

LI. Nothing in this Act shall entitle any person to refuse to answer any question or interrogatory in any civil proceeding in any Court of law or equity, but no answer to any such question or interrogatory shall be admissible in evidence against such person in any civil proceeding.

LII. The said Court may, from time to time, make general orders for referring all or any applications under this Act, to any master, deputy master or other officer of the Court, or to any Counsel or other person appointed by the Court in that behalf, and to regulate the fees to be paid on such reference, and the referee shall have the same powers as a Judge within the limits prescribed by such general orders; and the Court may also, from time to time, make other general orders for the purposes of this Act, and for regulating the practice under the same; and

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all general orders made in pursuance of this section may from time to time be rescinded or altered by the said Court.

SCHEDULE A.

IN CHANCERY.

Form of Petition for the Investigation, Sect. 3.

In the matter of *(the East half of lot No. in the
Concession in the Township of or as the case
may be, describing the property very briefly.)*

To the Honorable, the Judges of the Court of Chancery.

The Petition of

SHEWETH,—

That your Petitioner is absolute owner in fee simple in possession *(or as the case may be,)* of the following property *(describing it.)*

That there is no charge or other incumbrance affecting your Petitioner's title to the said land, *(except, &c., or,—that your Petitioner's title is subject only to the charges or incumbrances in the schedule hereto mentioned, and that the only persons having or claiming any charge, incumbrance, estate, right or interest in the said land are set forth in the schedule hereto annexed, and that the charge, incumbrance, estate, right or interest belonging to or claimed by each is therein set forth.)* Your Petitioner therefore prays that his title to the said land may be investigated and declared under the Act for quieting titles to real estate in Upper Canada.

(Signed,)

A. B.

or

C. D., Solicitor for A. B.

SCHEDULE B.

Form of Registrar's Certificate of an Application under this Act, Sect. 4.

I certify that an application has been made by
to the Court of Chancery, under the Act for quieting
titles to real estate in Upper Canada, for a certificate of
title to the following lands [*stating them.*]

ALEX. GRANT,
Registrar.

SCHEDULE C.

Form of an Adverse Claimant's Statement, Sec. 19.

In the matter of, &c., (*as in petition.*)

A. B. of, &c., claims to be the owner of the said land,
&c., &c., (*stating very briefly the nature of the claim and
the grounds of it.*) Dated this day of 186 .

(Signed,)

A. B.

or

C. D., Solicitor for A. B.

SCHEDULE D.

Form of Chancery Certificate of Title, Sect. 28.

No. —

These are to certify under the authority of the Act for
quieting titles to real estate in Upper Canada, that A. B.
is the legal and beneficial owner in fee simple
in possession (*or as the case may be,*) of all, &c., [*here*

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describe the property,] subject to the reservations mentioned in the seventeenth section of the said Act and therein numbered respectively one, two, three and four, (or as the case may be,) and to (specifying either by reference to a schedule or otherwise any of the other charges or incumbrances, exceptions or qualifications to which the title of A. B. is subject) but free from all other rights, interests, claims and demands whatever. Or that [stating the facts found and declared under the thirty-fifth Section of this Act, and stating on whose application the same are declared.]

In Witness whereof [Chancellor or one of the Vice Chancellors,] of the said Court, has hereunto set his hand, and the seal of the said Court has been hereunto affixed, this _____ day of _____

A. GRANT, Registrar.

C. D.

L. S.

SCHEDULE E.

Form of Chancery Deed, Secs. 33 and 34.

No. _____

The Court of Chancery for Upper Canada, under the authority of the Act for quieting titles to real estate in Upper Canada, doth hereby grant unto A. B., &c., [*here describe the premises sold*], to hold the same unto the said his heirs and assigns forever [*as the case may be*], subject to [*here specify as in the case of a Chancery certificate of title.*]

In Witness whereof [Chancellor, or one of the Vice-Chancellors of the said Court,] has hereunto set his hand, and the seal of the said Court has been hereto set, this _____ day of _____, in the year of Our Lord,

A. GRANT, Registrar.

C. D.

L. S.

29TH VIC. CAP. XXVIII.—AN ACT TO AMEND
THE LAW OF PROPERTY AND TRUSTS IN
UPPER CANADA.

HER Majesty, by and with the advice and consent
of the Legislative Council and Assembly of
Canada, enacts as follows :

I. Where any license to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted, or to be hereafter granted, shall at any time after the passing of this Act, be given to any lessee or his assigns, every such license shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease, or other matter thereby specifically authorised to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license); and all rights under covenants and powers of forfeiture and re-entry in the lease contained, shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorised or made punishable by such license, in the same manner as if no such license had been given and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorised to be done.

II. Where in any lease heretofore granted or to be hereafter granted, there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without license, and a license at any time after the passing of this Act shall be given to one

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of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property, (*as the case may be*), over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such license.

By *Dumpro's case*, 4 Co. Rep. 119; 1 Smith's L. C., it was decided that a condition of re-entry was in law indivisible; so that a license to do the act intended to be restricted, though in a particular instance, destroyed the condition altogether.

III. Where any actual waiver of the benefit of any covenant or condition in any lease, on the part of any lessor, or his heirs, executors, administrators, or assigns, shall be proved to have taken place after the passing of this Act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of such covenant or condition, unless an intention to that effect shall appear.

IV. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all

conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reservation in respect of the apportioned rent or other reservation allotted or belonging to him.

This section does away with the second resolution in *Knight's case*, 5 Rep. 55; see *Roberts v. Snell*, 1 M. & Gr. 577; *Bliss v. Collins*, 4 Mad. 229; 5 Barn & Ald. 876.

20 V. The Court of Chancery shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the Court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the Court, in conformity with the covenant to insure, upon such terms as to the Court may seem fit.

This section has been held to apply to a breach committed since the passing of the Act, though the lease in which the covenant was contained was executed before that time, *Page v. Bennett*, 2 Giff. 117; 6 Jur. N. S. 419.

By the corresponding English statute the Court has no power to relieve the same person more than once in respect of the same covenant or condition. Before this statute, Courts of Equity could not relieve against such forfeiture for not insuring, *Reynolds v. Pitt*, 19 Ves. 134; 2 Price, 212 n.; *Gregory v. Wilson*, 9 Ha. 683; and a forfeiture would be committed though the premiums had been paid before action and the policy was then on foot, *Doe d. Pitt v. Shewin*, 3 Camp. 134; *Doe v. Ulph*, 13 Q. B. 204; *Wilson v. Wilson*, 14 C. B. 616; and the covenant to insure would be broken by the most trifling departure from its terms, *Haven v. Middleton*, 10 Ha. 641; *Pennill v. Harborne*, 11 Q. B. 368; though committed by mere mistake, *Rolfe v. Harris*, 2 Price, 206, n.; *Greene v. Bridges*, 4 Sim. 96.

VI. The Court, where relief shall be granted, shall direct a record of such relief having been granted to be made by endorsement on the lease or otherwise.

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VII. The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire, shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relative to the building or other property covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

VIII. Where on the *bona fide* purchase, after the passing of this Act, of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of the rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase, an insurance in conformity with the covenant, the purchaser or any person claiming under him, shall not be subject to any liability by way of forfeiture or damage or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

As to what constitutes notice, see notes to *Le Neve v. Le Neve*, 2 White & Tudor's L. C. 38.

IX. The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives, or otherwise, and also to a lease for the life

of the lessee or the life or lives of any other person or persons.

X. The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the releases.

XI. A deed hereafter executed in the presence of, and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding it shall have been especially required that a deed or instrument in writing, made in exercise of such power, should be executed or attested with some additional or other form of execution or attestation or solemnity; Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donor of a power from executing it conformably to the power, by writing or otherwise, than by an instrument executed and attested as an ordinary deed, and to any such execution of a power, this provision shall not extend.

See notes to *Tollett v. Tollett*, 1 White & Tudor's L. C., 184.

XII. Where, under the power of sale, a *bona fide* sale

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shall be made of an estate, with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction, shall by mistake, be allowed to receive for his own benefit a portion of the purchase money or value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest under the direction of the Court, upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly, the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application, as between solicitor and client, shall be paid by the purchaser or the claimant under him.

This section is intended to meet the case of *Cockerell v. Cholmeley*, 1 R. & M., 418; 1 C. & F. 60.

XIII. Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his real estate or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the tes-

tator, to raise such debt, legacy or money as aforesaid by a sale and absolute disposition, by public auction or private contract, of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed, may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper.

The law was in an unsettled state as to the right person to sell under a will where the estate was vested in trustees charged with debts or legacies upon trusts declared by the testator, but without any provision for raising the debts or legacies; or where there was such a charge, but the testator's whole interest was not devised to trustees, see *Doe v. Hughes*, 6 Ex. 223.; *Robinson v. Lowater*, 5 D. M. & G., 272; *Wrigley v. Sykes*, 21 Beav. 337; *Cook v. Dawson*, 29 Beav. 123.

Before this statute the cases appear to have decided that where there was a general charge of debts upon real estate, the executors had in equity an implied power to sell it, and they alone could give a valid receipt for the purchase money; but as they did not take by implication a legal power to sell, and could not convey the legal estate, the persons in whom it was vested must have joined with them in the conveyance, *Shaw v. Borrer*, 1 Keen, 559; *Robinson v. Lowater*, 17 Beav. 592; 5 D. M. & G., 272; *Forbes v. Peacock*, 12 Sim., 528; *Eidsforth v. Armstead*, 2 K. & J., 333; *Ball v. Harris*, 4 M. & C., 264.

XIV. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

XV. If any testator who shall have created such a charge as is described in the thirteenth section, shall not have devised the hereditaments charged as aforesaid, in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being, named in the will, if any,

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shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall, for the time being, be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

XVI Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections thirteen, fourteen and fifteen of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

XVII. The provisions contained in sections thirteen, fourteen, fifteen and sixteen, shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this Act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies; nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

XVIII. Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation

to the estate and seizin originally vested in the person seized to the uses, and the continued existence in him or elsewhere of any seizin to uses or *scintilla juris*, shall not be deemed necessary for the support of, or to give effect to future or contingent or executory uses; nor shall any such seizin to uses or *scintilla juris* be deemed to be suspended, or to remain or to subsist in him or elsewhere.

XIX. Any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

XX. Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this Act, conceal any settlement, deed, will or other instrument material to the title, or any incumbrance, from the purchaser or mortgagee, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, or being found guilty, shall be liable, at the discretion of the Court, to suffer such punishment, by fine or by imprisonment for any time not exceeding two years, with or without hard labour, or by both, as the Court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them, in consequence of the settlement, deed, will or other incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in

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estimating such damages where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land ; but no prosecution for any offence included in this section, against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of Her Majesty's Attorney-General for Upper Canada, or in case that office be vacant, of Her Majesty's Solicitor-General for Upper Canada ; and no such sanction shall be given without such previous notice of the application for leave to prosecute, to the person intended to be prosecuted, as the Attorney-General or the Solicitor-General (*as the case may be*) shall direct ; and no prosecution for concealment shall be sustained unless a written demand of an abstract of title was served by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage.

See Drummond v. Tracey, 1 Johns, 608.

XXI. In the construction of the previous provisions in this Act, the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever ; and

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged or charged as security for the repayment of money or money's worth lent, and to be re-conveyed, re-assigned or re-leased on satisfaction of the debt ; and

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made ; and

The term "mortgagee" shall be taken to include every person to whom or in whose favor any such conveyance, assignment, pledge or charge as aforesaid is made or transferred.

XXII. A power of attorney executed by a married woman for the sale or conveyance of any real estate of or to which she is seized or entitled in Upper Canada, or authorizing the attorney to execute a deed barring or releasing her dower in any lands or hereditaments in Upper Canada, shall be valid both at law and in equity; provided, (1) that she be examined and a certificate indorsed on the power of attorney, as required in regard to deeds and conveyances by a married woman, under the Consolidated Statutes of Upper Canada respectively, intituled: *An Act respecting Dower*, and *An Act respecting the conveyance of Real Estate by Married Women*; and provided (2) that her husband is a party to and executes such power of attorney or the deed or other instrument executed in pursuance thereof, where the power is for the sale or conveyance of her real estate.

XXIII. In case a power of attorney for the sale or management of real or personal estate, or for any other purpose, provides that the same may be exercised in the name and on the behalf of the heirs or devisees, executors or administrators of the person executing the same, or provides by any form of words that the same shall not be revoked by the death of the person executing the same, such provision shall be valid and effectual to all intents and purposes both at law and in equity, according to the tenor and effect thereof, and subject to such conditions and restrictions, if any, as may be therein contained.

XXIV. Independently of any such special provision in a power of attorney, every payment made and every act

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done under and in pursuance of any power of attorney, or any power, whether in writing or verbal, and whether expressly or impliedly given, or an agency expressly or impliedly created after the death of the person who gave such power or created such agency, or after he has done some act to avoid the power or agency, shall, notwithstanding such death or act last aforesaid, be valid as respects every person party to such payment or act, to whom the fact of the death, or of the doing of such act as last aforesaid was not known at the time of such payment or act *bona fide* done as aforesaid, and as respects all claiming under such last mentioned person.

XXV. Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease, or agreement for a lease, as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease, or agreement for a lease, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased, to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be) of the personal estate of the deceased, to meet any future liability under the said lease, or agreement for a lease; and the executor or administrator so distributing the residuary estate, shall not after having assigned the said lease, or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be per-

sonally liable in respect of any subsequent claim under the said lease, or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

This section has been held to be retrospective, *Smith v. Smith*, 1 Dr. & Sm. 384; *Re Green*, 2 D. F. & J. 121; reversing *Dodson v. Sammell*, 8 W. R. 252, on this point; and see *Reilly v. Reilly*, 34 Beav. 406; *Bennett v. Lytton*, 2 J. & H. 155, 158.

The case of a leasehold assigned to a residuary legatee is not with this section, such legatee not being a purchaser, *Dodson v. Sammell*, 9 W. R. 887.

Executors acting bona fide, under an order of the Court of Chancery, are protected from liability, and have no need to retain any portion of the assets to indemnify them against possible liability in respect of the testator's covenants, *Dean v. Allen*, 20 Beav. 1; *England v. Lord Tredegar*, 1 L. R. Eq. 344.

As to setting apart a fund in an administration suit to meet claims in respect of leaseholds assigned, and as to payment out of each fund, with the consent of the lessor, to residuary legatees, see *Bunting v. Marriott*, 9 W. R. 264.

XXVI. In like manner where an executor or administrator, liable as such, to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge, (whether any such rent be by limitation of use, grant or reservation,) or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate, whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property

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conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased, to meet any future liability under the said conveyance, or agreement for a conveyance; and the executor or administrator so distributing the residuary estate, shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

XXVII. Where an executor or administrator shall have given such, or the like notices, as in the opinion of the Court in which such executor or administrator is sought to be charged, would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets, or any part thereof, so distributed to any person of whose claim such

executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof, as the case may be; but nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets, or any part thereof, into the hands of the person or persons who may have received the same respectively.

As to the proceedings in administration suits, and the notices given to creditors and others, see *Ord. 466 et seq.*

An executor who has distributed the assets of the testator, after issuing advertisements, and taking the steps pointed out by this section, will have the same protection as if he had administered the estate under a decree of the Court; and if he should have retained any legacies as trustee, after appropriating them for the benefit of the cestui que trusts, he will no longer be under any liability *qua* executor, *Clegg v. Rowland*, 3 L. R. Eq. 368.

XXVIII. On the administration of the estate of any person dying after the passing of this Act, in case of a deficiency of assets, debts due to the Crown, and to the executor or administrator of the deceased person, and debts to others, including therein respectively debts by judgment, decree or order, and other debts of record, debts by specialty, simple contract debts, and such claims for damages as by statute, are payable in like order of administration as simple contract debts—shall be paid *pari passu* and without any preference or priority of debts of one rank or nature over those of another; but nothing herein contained shall prejudice any lien existing during the lifetime of the debtor on any of his real or personal estate.

XXIX. In case the executor or administrator gives notice in writing to any creditor or other person of whose claims against the estate such executor or administrator has notice, or to the attorney or agent of such creditor or other person, that the said executor or administrator rejects or disputes such claim, it shall be the duty of the claimant

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to commence his suit in respect of such claim, within six months after such written notice was given, in case the debt, or some part thereof, was due at the time of the notice, or within six months from the time the debt, or some part thereof, falls due, if no part thereof was due at the time of the said notice, and in default the said suit-*claim* shall be forever barred.

XXX. After the first day of January, one thousand eight hundred and sixty-six, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, but within the time within which the same might be brought to recover a legacy, that is to say, within twenty years next after a present right to receive the same, shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof shall have been accounted for or paid, or some acknowledgement of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit shall be brought but within twenty years after such accounting, payment or acknowledgement, or the last of such accountings, payments and acknowledgements, if more than one was made or given.

XXXI. Any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the Court of Chancery, or by summons upon a written statement to any such Judge in Chambers, for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust property or the assets of any testator or intestate; such petition or statement to be ac-

accompanied by a certificate of counsel, to the effect that in his judgment the case stated is a proper one for the opinion, advice, or direction of the Judge under this Act, and such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application or such of them as the said Judge shall think expedient; and the trustee, executor or administrator acting upon the opinion, advice or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator, in the subject matter of the said application; Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor or administrator in respect to any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice or direction; and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

The application under this section should be by petition, *Re Dennis*, 5 Jur. N. S. 1388; for form of petition, see *Re Pett's Will*, 27 Beav. 578; *Re Miles*, 27 Beav. 579.

The Court may make an order on the petition of a cestui que trust, *Re Ward*, 14 W. R. 98; and of one trustee without the concurrence of his co-trustee, *Re Muggeridge*, Johns. 625.

It was at one time held that the direction of the Judge as to the parties to be served, should be obtained in the first instance, but this practice has since been disapproved of, *Re Green*, 8 W. R. 403.

It is not necessary to serve all parties interested, unless there is a deficiency of assets, *Re Mockett*, Johns. 628.

The Act was not intended to decide nice questions of law, but to procure for trustees at a small expense the assistance of the Court upon points of minor importance arising in the management of the trust, *Re Caldwell*, 2 Cham. R. 150; *Re Spiller*, 2 L. T. N. S. 71; so advice has been given as to investments, *Re Lorens*, 1 Dr. & Sm. 401; or payment of debts, *Re Box*, 1 H. & M. 532.

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The Court will not on such a petition decide questions of detail where affidavits are required, *Re Barrington*, 1 J. & H. 142; nor questions of difficulty, *Re Simson*, 1 J. & H. 89; and see *Marsh v. Attorney General*, 2 J. & H. 61; nor pronounce an opinion on an hypothetical case, *Re Box*, 1 H. & M. 552.

Where questions of construction arise, a suit must be instituted, *Re Evans*, 30 Beav. 232; *Re Lorenz*, 1 Dr. & Sm. 401; *Re Hooper*, 29 Beav. 656; and see *Re Williams*, 1 Cham. R. 372.

These cases seem to overrule cases where questions of validity or construction of a bequest have been determined, *Re Michell*, 28 Beav. 39; *Re Green*, 8 W. R. 403; *Re Davis*, 9 W. R. 134; *Re Elmore*, 6 Jur. N. S. 1325; *Re Jacob*, 29 Beav. 402; but see *Re Peyton's Settlement*, 10 W. R. 515.

As a general rule, the costs of an application will be ordered to be paid out of the corpus of the trust property, *Re McVeagh*, Seton, 773; but where the question was as to the application of income, the costs were given out of the income, *Anon*, 8 W. R. 333.

XXXI. Every deed, will, or other document creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say:—"That the trustees or trustee, for the time being, of the said deed, will or other instrument, shall be respectively chargeable only for such moneys, stocks, funds and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults and not for those of each other, nor for any banker, broker, or other person with whom any trust moneys or securities may be deposited; nor for the insufficiency or deficiency of any stocks, funds or securities; nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being, of the said deed, will or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust premises all expenses incurred in or about the

"execution of the trusts or powers of the said deed, will
"or other instrument."

XXXIII. When any person shall, after the thirty-first of December, one thousand eight hundred and sixty-five, die seized of or entitled to any estate or interest in any land or other hereditaments, which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate, or any other real estate of such person, but the lands or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; Provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debts, either out of the personal estate of the person so dying as aforesaid or otherwise; Provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and sixty-six.

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29TH & 30TH VIC., CAP. 39.—AN ACT RESPECTING THE HEARING OF CAUSES IN THE COURT OF CHANCERY FOR UPPER CANADA.

HER Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

I. Any sitting of the Court of Chancery for Upper Canada, for the hearing of causes, may be held by any one of Her Majesty's Counsel learned in the law, of the Upper Canada Bar, upon such Counsel being required by the Chancellor or one of the Vice-Chancellors to attend for the purpose; and such Counsel, while holding such sitting, shall possess, exercise and enjoy all the powers and authorities of a Judge of the said Court.

II. The Counsel may give his decision either during the sitting or afterwards, and in case any party is dissatisfied with the decision of such Counsel, he shall be entitled to have the same reviewed by the said Court in the same manner and within the same time as in the case of a decision by a Judge of the said Court; and the order made thereupon shall be applicable to the Court of Error and Appeal in the same manner as other decrees and orders of the said Court of Chancery.

See Orders 192, 193.

III. The said Court shall have the power from time to time to make General Orders for regulating the practice under this Act, and to suspend, repeal, vary or revive such Orders as to the said Court may seem fit.

END OF PART I.

PART II.

ORDERS IN CHANCERY.

PRELIMINARY.

The Judges of the Court of Chancery for Upper Canada, do hereby, in pursuance and execution of all powers and authorities enabling them in that behalf, order and direct in manner following:—

1. From and after the first day of July, 1868, all the General Orders of this Court which have been at any time heretofore made, shall be abrogated; and in lieu thereof, the Orders hereinafter expressed shall constitute the General Orders of the Court.

2. The abrogation hereinbefore made shall not affect any practice of the Court, or any practice or usage of, in, or connected with any of the offices of the Court, or the officers thereof, which originated in, or was sanctioned by, any of the Orders hereby abrogated, except so far as the same may be inconsistent with anything hereinafter contained. (*Eng. Con. Ord. Prelim. r. 5.*)

3. Where any of the Orders hereby abrogated were intended to abolish any office, writ, practice, matter, fee, or thing, such abrogation shall not have the effect of reviving the same. (*Eng. Con. Ord. Prelim. r. 6.*)

4. Every Order or part of an Order hereinafter contained which is a repetition, without variation, of an Or-

der or part of an Order hereby abrogated, shall receive the same construction as was put on the abrogated Order or part of an Order, and shall operate, not as a new Order, but in the same manner, whether as to the time of operation or otherwise, as the abrogated Order or part of an Order would have operated if this consolidation had not been effected. (*Eng. Con. Ord. Prelim. r. 7.*)

5. Every Order or part of an Order hereinafter contained which is a repetition, with variation, of an Order or part of an Order hereby abrogated, shall receive the same construction as was put on the abrogated Order, or part of an Order, and shall operate not as a new Order, but in the same manner, whether as to the time of operation, or otherwise, as such abrogated Order or part of an Order would have operated if this consolidation had not been effected, except so far as such variation indicates a contrary intention. And where the variation is of such a character as to be reasonably attributable, not to a variation of intention, but simply to a design to harmonize the style or language of the several Orders hereinafter incorporated, such variation shall not be deemed to indicate any such contrary intention. (*Eng. Con. Ord. Prelim. r. 8.*)

6. The following writs, pleadings, and proceedings, are abolished :—

- Subpœnas to appear and answer ;
- Subpœnas to rejoin ;
- Attachments with proclamations ;
- Commissions of rebellion ;
- Bills of revivor ;
- Original bills in the nature of bills of revivor ;
- Supplemental bills ;
- Original bills in the nature of supplemental bills ;
- Bills of revivor and supplement ;

Bills in the nature of bills of review ;
 Bills to impeach decrees on the ground of fraud ;
 Bills to suspend the operation of decrees ;
 Bills to carry decrees into operation ;
 Pleas ;
 Appearance either by the defendant, or by the plain-
 tiff on his behalf ;
 Exceptions to bills, answers, or other proceedings
 for scandal or impertinence ;
 Rules to produce witnesses ;
 Rules to pass publication ;
 Orders nisi ;
 Applications to be examined *pro interesse suo* ;
 Setting down a cause on an objection for want of
 parties merely.

It shall not be necessary, in order to enforce any order or decree to obtain any order for, or sue out a warrant to, the Sergeant-at-arms.

7. In these Orders, and in all Orders to be passed hereafter, the following words shall have the meanings hereby assigned to them, besides their ordinary meanings, unless there is something in the subject or context repugnant to such construction, viz :

1. Words importing the singular number include the plural number ; and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word " person " or " party " includes a body politic or corporate.
4. The word " bill " includes information.
5. The word " plaintiff " includes informant.
6. The word " affidavit " includes affirmation.
7. The word " legacy " includes an annuity and a specific as well as a pecuniary legacy.

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8. The word "legatee" includes a person interested in a legacy.
9. The expression "residuary legatee" includes a person interested in the residue.
10. The word "order" includes decree and decretal order.
11. The word "Master" includes Accountant and Local Master.
12. The word "month" means calendar month.

II. OFFICERS OF THE COURT.

REGISTRAR.

8. All orders made in open Court, or to be issued on precipe for foreclosure, sale, or redemption, or for a sale instead of foreclosure on the application of an incumbrancer, are to be drawn up, settled and passed by the Registrar.

The minutes having been settled by the Registrar, should not be altered in the absence of any party, *Major v. Major*, 13 Jur. 1. A case ought not to be spoken to on the minutes until they have been prepared by the Registrar, unless he himself requires it, *Prince v. Howard*, 14 Beav. 208.

Under Orders 434 & 435, decrees are issued in precipe, in suits for the foreclosure, sale or redemption of a mortgage, where no answer is filed; or where the answer admits the facts entitling the plaintiff to a decree.

By Order 456, an incumbrancer, made a party in the Master's office and entitled to a sale of the mortgaged property, may on depositing in Court \$80 to meet the expenses of the sale, obtain an order for a sale instead of foreclosure.

The Court will not set aside a decree regularly obtained upon precipe, except upon affidavit shewing that the defendant will be damaged by the decree being permitted to stand against him, *Mitchell v. Crooks*, 2 Grant, 123.

9. After an order is passed and signed by the Registrar, the same is to be entered by the Entering Clerk, and issued by the Registrar to the party entitled thereto.

A decree when passed and entered can only be varied on a re-hearing, except in cases of fraud, *Mitford's Eq. Pl.*, 73; and even in case of fraud it cannot be rectified on petition, *Mussell v. Morgan*, 4 Bro. C. C. 74.

10. Every order is to be bespoken, and the briefs and other documents required for preparing the same are to be left with the Registrar, within seven days after the order is pronounced or finally disposed of by the Court. (1st April, 1867; Ord. 5.) (*Eng. Con. Ord. 1, r. 21.*)

11. In case an order is not bespoken, or the briefs and other documents are not left, within the time prescribed by Order 10, the order is not to be drawn up without leave being obtained on an application in Chambers. (1st April, 1867; Ord. 6.) (*Eng. Con. Ord. 1, r. 22.*)

12. No notice to settle minutes or pass an order is to be given unless by direction of the Registrar. (6th Feb. 1865; Ord. 22.)

The Registrar may under this order settle the minutes of any decree or order *ex parte*, but notice should always be given unless the case is an exceedingly simple one.

A somewhat similar order is in force in England, *Eng. Con. Ord. 1, r. 32*. Before the enactment of that order notice of passing a decree was held necessary, *Hargrave v. Hargrave*, 3 Mac. & G., 348; and on account of the omission of such notice the enrolment of a decree has been vacated, *Davenport v. Stafford*, 8 Beav., 508.

A notice of selling or passing served one day for the next is regular, *Re Christmas*, 19 Beav., 519.

If the parties do not attend it is usual to serve a second notice, but an order drawn up in the defendant's absence will not be set aside unless error be shown, *Smith v. Acton*, 26 Beav. 559; but if the minutes have been settled by the Registrar they cannot be altered in the absence of any of the parties interested, *Major v. Major*, 13 Jur. 1.

When upon a perusal of the minutes it appears that anything is doubtfully expressed, or contrary to the meaning of the Court or that something has been omitted which should have been inserted, and the Registrar refuses to alter them, an application must be made to the Court to vary the minutes.

This is done by notice of motion served upon all parties, and the alteration desired should be expressed in the notice, *Prince v. Howard*, 14 Beav. 208; *Hood v. Cooper*, 26 Beav. 373. There is no time limited within which the motion must be made, but the application will be entertained at any time while the decree remains in minutes. Questions of import-

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ance should not be raised on motions to vary minutes, but this rule is not strictly adhered to, and discussions of great moment have been permitted. *Perry v. Phelps*, 1 Ves. 250.

The minutes having been settled, the decree is engrossed and notice is served appointing a time to pass it. The parties having attended upon the motion to pass, and passed the decree, it is next entered in the decree book in the Registrar's office, and the date of such entry is written in the margin of the book. All proceedings under a decree or order before it is entered, are voidable and irregular, *Tolson v. Jervis*, 8 Beav. 364; *Drummond v. Anderson*, 3 Grant, 150. A decree founded on a bill taken *pro confesso*, must be passed and entered as other decrees, *Ord.* 191.

13. Where a notice is given to settle minutes, or to pass an order, and the party served attends thereon, but the party giving the notice does not attend, or is not prepared to proceed, the Registrar may proceed *ex parte* to settle the minutes, or pass the order, or may in his discretion, order the party giving the notice to pay to the other the costs of his attendance; or if a party served asks for delay, the Registrar may grant the delay on such terms as he thinks reasonable as to payment of costs or otherwise. (6th Feb. 1865; *Ord.* 23.) (*Eng. Con. Ord.* 1, r. 28.)

ACCOUNTANT.

14. The Accountant is to take and dispose of such references of account and other matters as shall from time to time be made to him by any order. (6th Feb., 1865; *Ord.* 32.)

15. The Accountant is, in regard to matters referred to him, to have the same powers as the Master in Ordinary to issue warrants, make appointments, and settle and sign reports and certificates, and is to have all other powers and privileges of the Master, except taxation of costs; and the reports, certificates, and other acts of the Accountant, are to have the same effect, and be subject to the same Orders and Rules as those of the Master. (6th Feb., 1865; *Ord.* 33.)

By the original Chancery Act, 7 Wm. IV., c. 2, s. 9, it was enacted that it should be lawful for the Governor, Lieutenant-Governor, or person administering the government of the Province, from time to time, under the great seal of the Province, to appoint, during pleasure, one Registrar, two Masters, one Accountant, and a Sergeant-at-Arms, to the said Court of Chancery, who, when appointed, shall, in addition to the duties usually performed by the like officers in England, be liable to perform such other duties as shall be assigned to them by the Vice-Chancellor of Upper Canada.

Although, from the wording of the statute, it would appear as if the Registrar had the first rank, the Master the second, and the Accountant the third, the order should, in fact, be reversed. The Master takes rank over the Registrar, and the Accountant-General is the Senior Master. In England there were, prior to 15 & 16 Vic., cap. 80, when the office of Master was abolished, twelve Masters. The Master of the Rolls was one, and the chief; the Accountant-General was usually the Senior Master, of the remaining eleven; and the ten others were the ordinary Masters in Chancery, *Bennett's Master's Office*, 1.

The powers and duties of the Master are defined by *Orders 211 et seq.*, to which, and the notes appended, the reader is referred.

16. The Accountant is to be entitled to take and receive for his own use, the same fees for all warrants, reports, certificates, and other matters as are allowed to the Local Masters. (6th Feb., 1865; Ord. 34.)

JUDGES' SECRETARY.

17. In the absence of the Judge, the Judges' Secretary is to sit in Chambers, and hear any applications which the parties may choose to bring before him for this purpose; and he is immediately thereafter to submit the same, with his opinion thereon, to a Judge for his order; and the Secretary is to adjourn to a future day any applications he does not hear and of which notice was given. (10th Sept., 1865; Ord. 7.)

Applications to vary or discharge orders made by the Judges' Secretary, are to be made within fourteen days, and are in the first instance to be to a single Judge, upon notice, *Ord. 329*.

An appeal will not lie from an order made by the Judges' Secretary until it is signed and entered, *Gibb v. Murphy*, 2 Cham. R. 132. A party cannot use affidavits not used before the Judges' Secretary or make a new case, on an appeal, *Bank of Montreal v. Wilson*, 2 Cham. R. 117.

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18. The Judges' Secretary is to take and dispose of such references, and to perform such other duties, and render to the Judges such other services, as the Judges may respectively from time to time require.

19. All orders made in Chambers are to be prepared and signed by the Judges' Secretary; and are to be authenticated by the stamp of the office and issued by the Judges' Secretary.

20. Such orders made in Chambers, as require to be entered, are to be entered by the Entering Clerk in a separate book kept for that purpose.

No order of course, and no order obtained *ex parte* and not being of a special nature, is to be entered unless the entry thereof is directed by the Court or a Judge, *Ord.* 195.

21. The Judges' Secretary is to have, in reference to Chamber orders, the powers given to the Registrar by Orders 12 and 13, respecting the passing of orders.

By these orders the Registrar may proceed to settle the minutes of an order *ex parte*, when the party giving the notice does not attend, or may order the party giving notice to pay the costs of the attendance, or if the party served with the notice asks delay, he may grant it upon such terms as he thinks reasonable.

22. The Judges' Secretary is to keep in a book an account of the fees received by him, and to report to the Judges quarterly the particulars and amount thereof. (10th Sept., 1866; *Ord.* 31.

CLERK OF RECORDS AND WRITS.

23. The Clerk of Records and Writs is to perform the duties heretofore performed by the Registrar and his Clerks in relation to the several matters hereinafter mentioned, that is to say :

1. Receiving, filing and custody of pleadings, re-

ports, depositions, affidavits, and other papers and proceedings, and making entries thereof in the proper books.

2. Amending bills.
3. Entering consents, and notes *pro confesso*.
4. Setting down causes.
5. Certifying proceedings.
6. Examining and authenticating office copies of pleadings and other proceedings.
7. Preparing and issuing writs, commissions and orders of course.
8. Preparing certificates for registration, procuring the Registrar's signature thereto, and issuing the same.
9. Attending on the opening of commissions.
10. Attending with records and exhibits on the Judges of the Court or elsewhere.
11. Inrollment of decrees or orders.
12. The care and custody of all documents ordered to be deposited for safe keeping, or produced under any order of Court.
13. The care and custody of the books kept under the Act for Quieting Titles, and making the necessary entries therein.
14. Preparing certificates of the filing of petitions, procuring the Registrar's signature thereto, and issuing the same.
15. Transmitting petitions to the proper Reerece.
16. Entering and issuing certificates of title and conveyances granted under the Act.

A certificate of the Clerk of Records and Writs is conclusive as to the filing of a pleading, *Beavan v. Burgess*, 10 Jur. 63.

An affidavit cannot be read against the certificate of an officer of the Court, *Foley v. Griffith*, 2 Moll. 318.

The Court will not order production of the original document unless satisfied that an office copy is insufficient, *Jervis v. White*, 8 Ves. 318;

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Attorney-General v. Ray, 6 Beav. 335; 2 Ha. 518; 3 Ha. 335; *Anon*, 13 Beav. 420; and the application for an order must be on notice, *Lamb v. Danby*, 9 W. R. 765.

24. The Clerk of Records and Writs is to keep in his office a book to be called "The Solicitor's and Agent's Book," in which each solicitor residing elsewhere than in the City of Toronto, is to specify the name of an agent being a solicitor of this Court, and having an office in the City of Toronto, upon whom pleadings, writs, notices, orders, appointments, warrants, and other documents and communications may be served. (3rd June, 1853; Ord. 43, s. 1.)

As to the consequences of neglecting to comply with this order, see Ord. 42.

25. All orders of course are to be drawn up by the Clerk of Records and Writs upon precipe. (3rd June, 1853; Ord. 43, s. 9.)

If an order of course is irregular the proper course is to move to discharge it, *Eyles v. Ward*, Moseley 255; it cannot be treated as a nullity, *Chuck v. Cremer*, 2 Phill. 113; *Wilkins v. Stevens*, 10 Sim. 617; *Fenning v. Humphrey*, 4 Beav. 1; *Blake v. Blake*, 7 Beav. 514.

An order obtained *ex parte* on an incorrect statement of facts will be discharged, *De Feucheres v. Dawes*, 11 Beav. 46; *Jenkyns v. Byrant* 8 Drew. 70; *Brignall v. Whitehead*, 30 Beav. 229.

All orders drawn up by the Clerk of Records and Writs without the special direction of the Court, may be drawn up by the Deputy Registrar with whom the bill is filed, Ord. 37.

26. On Thursday in each week the Clerk of Records and Writs is to make out and transmit to the Registrar a list of all causes and matters set down for hearing during the ensuing week.

27. The Clerk of Records and Writs is on the last days of January, April, July and October in each year, to pay into Court to the credit of "The Suitors' Fee Fund Account," all moneys belonging to that Fund received by him during the preceding three months.

28. The Clerk of Records and Writs is to pay all money received by him under Order 39 forthwith into Court to the credit of "The Suitors' Fee Fund Account," and is on the 31st day of January, and 31st day of July, in each year, to lay before the Court a statement of the amount belonging to the said fund, received during the preceding six months, and the names of the Deputy Registrars (if any) who are in arrear thereto, or who have not made a return.

By Order 39 Deputy Registrars are required every half year to make a return to the Clerk of Record and Writs of the number of Bills, Answers and Demurrers filed during the preceding six months, and to transmit therewith the money belonging to the Suitors' Fee Fund.

29. The Clerk of Records and Writs is to perform such other duties as the Court by General Order, or otherwise, may from time to time direct.

30. All affidavits and papers filed with the Registrar or in Chambers, are to be transmitted to the office of the Clerk of Records and Writs the same day.

REGISTRAR'S CLERK.

31. The Registrar's Clerk in addition to his other duties, is to be the Ledger Clerk to the Suitors' Accounts, and is to keep the books required by the General Orders relating to the suitors' accounts, mortgages and other investments, and to be responsible for the due keeping of the same in accordance with the General Orders, and for the correctness of all entries therein.

As to the payment of money into and out of Court, and the Books to be kept in connection therewith, see *Ord. 352. et seq.*

ENTERING CLERK.

32. The Entering Clerk is to note in the margin of the book the day of entering a decree or order, and is at

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the foot of the decree or order to note the same date, and the book in which the entry has been made and the pages of such book. (10th Sept. 1866 ; Ord. 6.)

DEPUTY REGISTRARS.

33. Every Deputy Registrar is to keep in his office a book to be called "The Solicitors' and Agents' Book," in which each solicitor residing elsewhere than in the County in which such Deputy Registrar's office may be, is to specify the name of an Agent, being a solicitor of this Court, and having an office in the City or Town where the office of such Deputy Registrar is situated, upon whom all writs, pleadings, notices, orders, warrants, and other documents, and written communications in relation to proceedings conducted in the office of the Local Master or Deputy Registrar of such County, may be served. (3rd June, 1853 ; Ord. 44, s. 6.)

As to the consequences of neglecting to comply with this order, see Ord. 43.

34. Local Masters and Deputy Registrars respectively are to perform the duties of their several offices in the same manner, and under the same regulations, as the like duties are performed by the Master and by the Clerk of Records and Writs respectively ; and all orders, rules and regulations, in force respecting the Master and Clerk of Records and Writs respectively, and respecting the regulation of their respective offices, are to be in force and applicable to the Local Masters and Deputy Registrars, respectively, in relation to such duties as they are hereby required to perform ; and the like sums and fees payable to the Master and Clerk of Record and Writs respectively, are to be payable to the Local Masters and Deputy Registrars, respectively, in relation to similar matters. (3rd June, 1853 ; Ord. 44, s. 1.)

Deputy Registrars and Local Masters are appointed by the Judges, who may at their discretion remove them, *Con. Stat. U. C.*, c. 12, s. 13; they may retain for their own use all the fees of office, not belonging to any fee fund, *Ibid*, s. 15.

35 Where a bill is filed with a Deputy Registrar, the Local Master and Deputy Registrar respectively in the County where such bill has been filed, are to have all such powers and authorities in relation to such suit as belong to the Master and Clerk of Records and Writs respectively. (3rd June, 1853; Ord. 44, s. 3.)

The plaintiff has, *prima facie*, a right to have the reference directed to the Master resident in the County where the bill is filed, *Macara v. Gwynne*, 3 Grant, 310.

36. In addition to the powers and authorities conferred upon Local Masters by Order 35, the Local Master in the County where the bill has been filed may hear and dispose of all applications in the progress of such suit, for the following purposes, viz:—

1. To appoint guardians *ad litem* for infants.
2. For time to answer or *demur*. ?
3. For leave to amend before replication.
4. To postpone the examination of witnesses, or to allow further time for the production of evidence.
5. For security for costs. (3rd June, 1853; Ord. 44, s. 4.)

For the mode of proceeding to appoint a guardian *ad litem*, see Ord. 519 *et seq.*; and as to amendment of bills, see Ord. 78, *et seq.*

As to security for costs, see Ord. 409, and notes.

37. All orders which are drawn up by the Clerk of Records and Writs without the special direction of the Court may be drawn up by the Deputy Registrar with whom the bill is filed. (3rd June, 1853; Ord. 44, s. 5.)

38. Every Deputy Registrar may issue decrees on pre-cipe for foreclosure, sale or redemption, where the suit

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is between the original mortgagee and mortgagor only, and is to enter such decrees in a book, to be approved of by the Court, and kept for that purpose by the Deputy Registrar.

As to decrees in mortgage suits, see *Ord. 426, et seq.*

39. Every Deputy Registrar is forthwith, after the 30th June and 31st of December, in every year, to make a return to the Clerk of Records and Writs, of the number of bills, answers and demurrers, filed with such Deputy Registrar during the preceding six months, and is to transmit with such return the amount of fees payable into "The Suitors' Fee Fund Account."

As to the duty of the Clerk of Records and Writs on receiving such returns, or where they are not made, see *Ord. 28.*

III. SOLICITORS, AND PARTIES ACTING IN PERSON, AND SERVICE ON THEM RESPECTIVELY.

40. Upon every writ sued out, and upon every bill, demurrer, answer or other pleading or proceeding, there shall be endorsed the name or firm and place of business of the solicitor and solicitors by whom such writ has been sued out, or such pleading or other proceeding has been filed; and when such solicitors are agents only, then there shall be further endorsed thereon the name or firm, and place of business of the principal solicitor. (3rd June, 1853; *Ord. 43, s. 2.*)

Service of subpœna to appear and answer, without endorsement, may be set aside on speedy application, *Johnson v. Barnes*, 1 DeG. & S. 129; omission of the address for service does not necessarily make the writ void, but the Court will stay process till the rule is complied with, *Price v. Webb*, 2 Hare, 511. An attachment was discharged with costs, endorsement of subpœna on which it issued being defective, *Barnes v. Tweddell*, Coop. 440.

An irregularity in the endorsement on a pleading, of the name and place of business of the solicitor filing it, is waived by demanding and receiving a copy of the pleading, *Bennett v. O'Meara*, 2 Cham. R. 167.

As to changing a solicitor, see *Ord.* 49, and the notes.

41. Where the name and place of business of a solicitor have been endorsed upon any pleading or proceeding filed, it shall not be necessary to indorse such place of business on any pleading or proceeding in the same cause or matter subsequently filed or subsequently served on any person who was served with the former proceeding. (10th Sept., 1866; *Ord.* 32.)

42. Where the pleadings in any cause have been filed in the office of the Clerk of Records and Writs, or in the office of any Deputy-Registrar, all notices, appointments, warrants, and other documents and written communications in relation to matters transacted in Court or Chambers, or in the office of the Master, Registrar or Clerk of Records and Writs, which do not require personal service upon the party to be affected thereby, are to be served upon the solicitor when residing in the City of Toronto; and when the solicitor to be served resides elsewhere than in the City of Toronto, then such notices, appointments, warrants, and other documents, and written communications aforesaid, may be served either upon such solicitor or upon his Toronto agent named in the "Solicitors' and Agents' Book;" unless the Court, or a Judge thereof, or a Master, before whom any such proceeding is had shall give any direction as to the solicitor upon whom any such notice, appointment, warrant, or other document or written communication is to be served. If any solicitor neglect to cause such entry to be made in the "Solicitors' and Agents' Book," as is required by Order 24, the posting up a copy of any such notice, appointment, warrant or other document, or written communication for the solicitor so neglecting as aforesaid, in the office of the Clerk of Records and Writs, is to be deemed

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sufficient service, unless the Court direct otherwise. (29th June, 1861.)

As to service on solicitors generally, see *Re Wisewold*, 16 Beav. 357; *Re Dufaur*, 16 Beav. 113; *Re Catlin*, 18 Beav. 508; *Wilson v. Emmett*, 19 Beav. 238; *Re Thomson*, 20 Beav. 545; *Ex parte Bolton*, 25 Beav. 368, *Re Walton*, 4 K. & J. 78.

The Court, under peculiar circumstances, allowed service to be affected upon the solicitor by placing it under the door of his chambers, *Re Templeman*, 20 Beav. 574; where a solicitor had absconded, he was held properly served with a notice of motion left at his unoccupied place of business, *Newton v. Thompson*, 22 L. J. Ch. 10.

43. All writs, pleadings, notices, orders, warrants, and other documents and written communications which do not require personal service upon the party to be affected thereby, may be served upon his solicitor residing in the county where such proceedings are conducted, or, where such solicitor does not reside in the county where such proceedings are conducted, then upon the agent named in "the Solicitors' and Agents' Book," provided for by Order 33. And if any such solicitor neglect to cause such entry to be made in "the Solicitors' and Agents' Book," the posting up a copy of any such writ, pleading, notice, order, warrant or other document or written communication for the solicitor so neglecting as aforesaid in the office of such Deputy Registrar, is to be deemed sufficient service. (3rd June, 1853; Ord. 44, s. 6.)

See notes to preceding Order.

44. Every party suing or defending in person is to cause to be endorsed or written upon every writ which he sues out, and upon every bill, demurrer, answer, or other pleading or proceeding, his name and place of residence, and also (when his place of residence is more than three miles from the office where such pleading or other proceeding is filed) another proper place, to be called his address for service, not more than three miles from the said office, where writs, notices, orders, war-

rants, and other documents, proceedings and written communications may be left for him. (3rd June, 1853; Ord. 43, s. 3.)

See notes to Order 40.

45. Where a party sues or defends in person, and no address for service of such party is written or printed pursuant to the directions of Order 44, or where a party has ceased to have a solicitor, all writs, notices, orders, summonses, warrants, and other documents, proceedings and written communications, not requiring personal service upon the party to be affected thereby, shall, unless the Court shall otherwise direct, be deemed to be sufficiently served upon such party, by posting up a copy thereof in the office of the Clerk of Records and Writs or Deputy Registrar where the bill is filed. But if an address for service is written or printed as aforesaid, then all such writs, notices, orders, summonses, warrants and other documents, proceedings, and written communications, shall be deemed sufficiently served upon such party if left for him at such address for service.

46. Where a party or a solicitor causes an answer, demurrer or replication to be filed, he is to give notice thereof, on the same day, to the solicitor of the adverse party or to the adverse party himself if he act in person. (3rd June, 1853; Ord. 19.) (*Eng. Con. Ord. 3, r. 9.*)

This is important, as the defendant cannot move to dismiss unless he is prepared to prove the service of notice of his answer being filed, *Kay v. Sanson*, 1 Cham. R. 71. In *Jones v. Jones*, 1 Jur. N. S., 863, this was held unnecessary, but the Court has refused to act upon this case, as rendering this order inoperative; and see *Low v. Williams*, 12 Beav. 482.

The omission to serve notice does not entitle the opposite party to treat the pleading as a nullity or as irregular, *Smith v. Muirhead*, 2 Grant, 395.

Where a month elapsed between the filing of the replication and serving the notice, the replication was ordered to be taken off the files, *Johnson v. Tucker*, 15 Sim. 599; but the proper course seems to be, not to

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move to take it off the files, but to move to enlarge the time for taking the next step in the cause, *Wright v. Angle*, 6 Hare 107; *Lloyd v. Solicitors' Life Assurance Co.*, 3 W. R., 640. In this case V. C. Wood, to discourage the practice of such summary applications on a mere slip, refused to give any costs.

47. Where an acceptance of service of any bill, order, or other proceeding, and an undertaking to answer or appear thereto are given by a solicitor, such acceptance and undertaking are to be equivalent to personal service upon the party for whom the same are given, within the meaning of the Order requiring personal service, and an affidavit of personal service is in such case dispensed with. (10th Sept. 1866; Ord. 33.)

Where a solicitor accepts service of an office copy of a bill and undertakes to answer, the bill may be noted pro confesso in default of an answer, without any notice being served.

When the solicitor accepts service only, notice of motion for an order pro confesso must be given, but the notice may be served upon the solicitor, *Ross v. Hayes*, 6 Grant, 277.

48. Admissions and acceptances of the service of a bill, order, notice of motion or other paper, upon the opposite solicitor, need not be verified by affidavit. (3rd June, 1853; Ord. 40, s. 1.)

49. A party suing or defending by a solicitor, shall not be at liberty to change his solicitor in any cause or matter without an order of the Court for that purpose, which may be obtained on precipe; and until such order is obtained and served, and notice thereof given to the Clerk of Records and Writs, or Deputy Registrar with whom the pleadings are filed, the former solicitor shall be considered the solicitor of the party.

Before this order it was not necessary to obtain an order to change the solicitor, *Bailey v. Bailey*, 2 Cham. R. 57.

All the plaintiffs in a suit should appear by one solicitor, *Peareth v. Peareth*, Johns 58.

An order to change, operates as a discharge of the solicitor by the client, *Webster v. Le Hunt*, 9 W. R. 804; *Ward v. Swift*, 6 Ha. 309.

The order applies where there has been a change only in the firm of solicitors, *Muttlebury v. Hayward*, 8 Jur. 1085. Where the solicitor dies pending the suit no order is necessary, *Whalley v. Whalley*, 22 L. J. Ch. 682; *Alchin v. Buffalo and Lake Huron Rail. Co.*, 2 Cham. R. 45. Where money is standing to the separate account of a party to the cause, he may apply for payment out by a new solicitor, *Waddilove v. Taylor*, 17 L. J. Ch. 384.

If the solicitor of a party to the suit dies, and he neglects to appoint a new one, he should be served with a subpoena to name a solicitor, *Ratcliffe v. Roper*, 1 P. Wms. 420; *Franklyn v. Colborne*, 12 Ves. 2; *Gibson v. Ingo*, 12 Jur. 105; 2 Phil. 402; and when a defendant's solicitor died, and the plaintiff obtained an order that he should name a new one, which he failed to do, the Court directed accounts to be taken in his absence, *Dean v. Lethbridge*, 26 Beav. 397.

Where an order of course to change a solicitor was obtained, suppressing a special contract respecting the employment of a solicitor, it was discharged with costs, *Jenkins v. Bryant*, 3 Drew. 70; *Richards v. Scarborough Market Company*, 17 Beav. 83; *Topping v. Searson*, 2 H. & M. 205.

Although a solicitor may, for sufficient cause, give notice to his client, that he will not act as such solicitor, and thus terminate the connection between them, the Court will not make an order for that purpose upon the *ex parte* application of the solicitor, *Bricker v. Ansell*, 1 Cham. R. 367. ✓

Where the solicitor is changed without an order, services effected upon the old solicitor are regular, *Davidson v. Leslie*, 9 Beav. 104; *Wright v. King*, 9 Beav. 161.

As to the lien of a solicitor who is discharged by an order changing the solicitor, see *Cresswell v. Byron*, 14 Ves. 271; *Commerall v. Poynton*, 1 Swans. 1; *Colgrave v. Manley*, T. & R. 400; *Healop v. Metcalfe*, 3 M. & C. 183; *Bozon v. Bolland*, 4 M. & C. 354; *Cane v. Martin*, 2 Beav. 584.

A solicitor who conducts a case to its conclusion in the place of one who by arrangement with his client retires from the conduct of it, has priority for his costs in case of a deficiency of assets, *Cormack v. Beisly*, 3 D. & J., 157.

Where a solicitor voluntarily withdraws he must deliver the client's papers to the new solicitor, but where he is discharged by the client, he is not disentitled to his lien, even though the reason is that he is in embarrassed circumstances, *Re Smith*, 9 W. R. 396; *Re Williams*, 28 Beav. 465; 3 D. F. & J. 157.

The client is entitled to the convenient use of his papers in pending business, even where the lien exists, *Rawlinson v. Moss*, 9 W. R. 733; and where a solicitor refused to carry on a suit unless money was advanced, or

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to deliver up the papers until his costs were paid, the Court on the client's application, ordered a taxation, and that the papers should be delivered to the new solicitor on his undertaking to hold them subject to the former solicitor's lien, if any, and to re-deliver them within ten days after he had ceased to have occasion for them for the purposes of the suit, *Ley v. Brown*, 1 Cham. R. 179.

50. Where a solicitor is struck off the roll of solicitors or prohibited from practising as a solicitor, for malpractice or misconduct as a solicitor, or other sufficient cause, the Registrar is forthwith to certify under the seal of this Court, such dismissal or prohibition, and the grounds thereof expressed in general terms, and transmit such certificate to each of the Superior Courts of Ontario. (6th Feb. 1854.)

51. This Court on receipt of a similar certificate from the Court of Queen's Bench, or Court of Common Pleas, of any attorney of either of the said Courts respectively, having been struck off the roll of such Court, or prohibited from practising therein, will thereupon take proceedings for striking such person, being a solicitor of this Court, from the roll of solicitors; or for prohibiting his practising therein, according to the course and practice, and in like manner and under like circumstances, observed in similar cases in the Superior Courts in England. (6th Feb. 1854.)

52. Where a case appears justifying or requiring by the practice hitherto, an order against a solicitor that he be struck off the roll of solicitors, unless he shall before a time therein limited, shew unto the Court good cause to the contrary, it shall be competent for the Court in lieu thereof to issue an order calling upon the solicitor to answer the matters appearing on affidavit or otherwise.

For the mode of proceeding before this order, see *Goodwin v. Gosnell*, 2 Coll. 457, 462; *Wheatley v. Bastow*, *Re Collins*, 7 D. M. & G. 261, 558; *Thorndyke v. Hunt*, 5 Jur. N. S. 879, 882; *Re Martin*, 6 Beav. 337; *Re Chandler*, 22 Beav. 253; *Re Hall*, 2 Jur. N. S. 633.

IV. PARTIES.

Formerly the subject of parties was one of great intricacy, and difficult questions often arose as to the applications of the general rules. At the present day the learning on the subject has been greatly simplified, but, as it still deserves, and should receive, careful study, a few observations may be made as to persons by whom a suit may be instituted. The general rule is that every person may, on his own behalf, file a bill, if that be the proper remedy, and the subject be within the jurisdiction of a Court of Equity; but the matter in dispute must be of sufficient value to warrant the interference of the Court.

There are, however, two leading exceptions to the foregoing rule; the one of persons enjoying peculiar privileges, the other of persons labouring under disabilities. Among the first class are, the Crown, those who partake of its prerogative, or whose rights are under its protection, and for eign States; among the second class are, married women, and infants.

1. *The Crown.*

Where a suit is instituted on behalf of the Crown, the matter of complaint is offered to the Court by the Attorney General by way of information. Where the rights of the Crown are immediately concerned, the Attorney General proceeds upon his own authority, but where they are not immediately concerned, he depends on the relation of some person whose name is inserted in the record, and who is called the relator, *Mitford's Eq. Pl.* 22. This person in reality sustains and directs the suit; and is answerable to the Court and the parties for the propriety of the proceedings and the conduct of them, *Daniel's Ch. Pr.* 11; and he is liable for the costs, *Atty. Gen. v. Smart*, 1 Ves. Sen. 72. He cannot, however, take any step in the cause, in his own name and independent of the Attorney General, *Atty. Gen. v. Wright*, 3 Beav. 447. In the last mentioned case, a notice of motion having been given on behalf of the relator, an objection was made that it ought to have been on behalf of the Attorney General, and Lord Langdale decided that the notice was irregular, and said that "relators should know that they are not parties to informations, and have no right of their own authority to make any application to the Court. The Attorney General is the only person whom this Court recognizes in such cases." And in another case Lord Cottenham refused to hear the relator in person on behalf of the Attorney General, and said he could not separate the information from the bill so as to hear him as the plaintiff in the suit, *Atty. Gen. v. Barker*, 4 M. & C. 262. It sometimes happens that the relator has an interest in the matter in dispute, of the injury to which interest he is entitled to complain (in, and) such case his personal complaint being joined to and incorporated with the information given to the Court by the officer of the Crown, they form together an information and bill, and are so termed. They are, however, in some respects, considered as distinct proceedings; and the Court will treat them

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as such, by dismissing the bill and retaining the information, even though the relief to be granted is different from that prayed, *Atty. Gen. v. Vivian*, 1 Russ. 226. Though it is usual to have a relator, yet it is not necessary, and the Attorney General may if he pleases proceed without one, *Re Bedford Charity*, 2 Swanst. 520.

As the relator is liable for the costs, neither an infant, a married woman, nor a lunatic, can be a relator, *Atty. Gen. v. Tyler*, 2 Eden. 230.

If there are several relators, the death of one of them will not affect the suit, but if they all die, or if there be but one and he dies, though the suit does not abate, the Court will not allow any further proceedings until an order is obtained for liberty to insert the name of a new relator, *Atty. Gen. v. Haberdashers' Co.*, 16 Jur. 717; otherwise there would be no person to pay the costs of the suit in case the information should be deemed improper, or for any other reason should be dismissed.

The application to name a new relator must be made by the Attorney General, not by the defendant, *Atty. Gen. v. Plumtree*, 5 Madd. 452.

When informations are filed on behalf of idiots and lunatics, it seems that not only must the lunatic be a party, but it is also requisite that there should be a relator who may be responsible to the defendant for the costs of the suit.

The object in requiring that there should be a relator in informations exhibited on the part of the Attorney General, is, that there may be some person answerable for the costs, in case they should have been improperly filed. Thus, where the information was held to have been unnecessary, and contrary to the right, the costs were ordered to be paid by the relator, *Atty. Gen. v. Smart*, 1 Ves. Sen. 72; but where the relator insisted upon a particular construction of the will of the person by whom the charity was founded, and in which there was considerable ambiguity, although he failed in satisfying the Court that his construction was the right one, and the information was dismissed, the Court did not make him liable for the costs of the defendant, *Atty. Gen. v. Oglender*, 1 Ves. 246. And in general where an information prays a relief, which is not granted, but the Court thinks proper to make a decree according to the merits, so that the information is shown to have had a foundation, although the relief is not such as the relator prayed, the relator will not be ordered to pay the costs, *Atty. Gen. v. Bolton*, 3 Anst. 820.

In general where relators conduct themselves properly, and their conduct has been beneficial, they are allowed their costs, *Atty. Gen. v. Brewers Co.* 1 P. Wms. 376.

In some cases the costs of the relators will be allowed as between solicitor and client, on the principle that otherwise people would not come forward to file informations, and in special cases they will be allowed their charges and expenses in addition to the costs of the suit, *Daniel's Ch. Pr.* 18; *Atty. Gen. v. Kerr*, 4 Beav. 297; *Atty. Gen. v. Ironmongers' Co.* 10 Beav. 194.

If it be made to appear to the Court, after the information is filed, that the relator is not a responsible person, all further proceedings will be suspended till a proper person shall be named as relator, *Atty. Gen. v. Tyler*, 2 Eden. 230; and see *Atty. Gen. v. Knight*, 3 M. & C. 154.

An information by the Attorney General cannot be dismissed for want of prosecution, it is his privilege to proceed in what way he thinks proper; but an information in his name by a relator, is subject to be dismissed for want of prosecution, with costs, *Daniel's Ch. Pr.* 18.

2. Foreign Governments.

It was regarded by Lord Thurlow as doubtful whether the Sovereign of a foreign State could sue in the Municipal Courts of this country, and whether the claims of such a person were not matter of application from State to State, *Barclay v. Russell*, 3 Ves. 431; *The Nabob of the Carnatic v. East India Co.*, 1 Ves. 371; the point has now, however, been decided in the affirmative, *The King of Spain v. Machado*, 4 Russell, 225; *City of Berne v. Bank of England*, 9 Ves. 347.

To entitle a foreign government to sue, it is necessary that it should have been recognized by the English Government. This was first discussed in the *City of Berne v. the Bank of England*, when an application to restrain the Bank of England and South Sea Company from permitting the transfer of certain funds standing in the name of trustees under a purchase by the old government of Berne before the revolution, was opposed on the ground that the existing government of Switzerland had not been acknowledged by the government of England, and could not be noticed by the Court. Lord Eldon refused to make the order, observing that it was extremely difficult to say that a judicial Court can take notice of a government never recognized by the government of the country in which the Court sits; and that whether the foreign government was recognized or not, was matter of public notoriety.

The fact of the foreign government not having been acknowledged is matter of public notoriety, and must be taken judicial notice of by the Court, even though there is an averment in the bill, that it has been recognized, *Taylor v. Barclay*, 2 Sim. 213.

Where a foreign state comes for the aid of the Court, in the assertion of its rights, it must sue in a form which makes it possible for the Court to do justice to the defendants; and it must sue in the name of some public officer entitled to represent the interests of the state, upon whom process on the part of the defendant may be served, *The Columbian Government v. Rothschild*, 1 Sim. 104; and see *United States v. Wagner*, 3 L. R. Eq 724.

3. Corporations.

Not only have persons in their natural capacities the right to sue, but

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the power to sue and be sued in their corporate name is a power inseparably incident to every corporation, whether it be sole or aggregate.

As a corporation must take and grant by their corporate name, so by that name they must in general sue and be sued; and they may sue by their true name of foundation, though they be better known by another name, *Daniel's Ch. Pr.*, 22.

A suit by a corporation aggregate, to recover a thing due to them in their corporate right, must not be brought in the name of their head alone, but in their full corporate name, unless it appears that the Act of Parliament or charter by which they are constituted enables them to sue in the name of their head. But though it appears that the head of the corporation is enabled to sue in his own name for anything to which the corporation is entitled, this will not preclude it from suing by its name of incorporation.

In the case of a bill and information, in which the corporation of Leeds was both plaintiff and relator, an objection was made that a corporation, being a body whose identity is continuous, could not be heard to impeach transactions carried into effect in its own name by its former governing body; but the objection was overruled by Lord Cottenham. He observed "that the true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purpose of injuring its interests and alienating its property, shall the corporation be stopped in this Court from complaining, because the act done was ostensibly an act of the corporation," *Attorney General v. Wilson*, Cr. & Ph. 1.

As a corporation cannot, unless specially authorized by their constitution, sue by their head alone, so neither can a corporation aggregate, which has a head, sue or be sued without it, because without it the corporation is incomplete. It is not, however, necessary to mention the name of the head, 1 *Kyd*, 281; nor is it necessary in the case of corporations aggregate to name any of the members by their proper christian and surnames; but if in a suit in Equity by the members of a corporation in the corporate capacity, they are mentioned by their names, the suit will not become defective by the death of some of the members, although it would have abated if the suit had been by them in their individual characters, *Blackburn v. Jepson*, 3 Swanst. 133.

A sole corporation suing for a corporate right, having two capacities, a natural and a corporate, must always shew in what right he sues.

In this respect it differs from a corporation aggregate, because the latter having only a corporate capacity, a suit in their corporate name can be only in that capacity. It also differs from corporations aggregate, in that by the death of a corporation sole, a suit by him, although instituted

in his corporate capacity, becomes abated, which is not the case, as stated above, with respect to suits by corporations aggregate.

Although corporations aggregate are entitled to sue in their corporate capacity, the Court will not allow parties to assume a corporate character to which they are not entitled; and where it appears on the bill that the plaintiffs have assumed such a character without being entitled to it, a demurrer will hold, *Lloyd v. Loaring*, 6 Ves. 773.

A foreign corporation may sue in this country in their corporate name and capacity; but it is not necessary in pleading that they should set forth the proper names of the persons who form such corporation, or shew how it was incorporated; though if it be denied, they must prove that by the law of the foreign country they were effectually incorporated, *Dutch West India Company v. Vanmoysee*, 2 Ld. Ray. 1535.

In the case of *Lloyd v. Loaring*, above referred to, Lord Eldon gave the plaintiffs leave to amend their bill by striking out their present style as plaintiffs, and suing as individuals on behalf of themselves, and the other persons interested. And ever since, it has been held, that where all parties stand in the same situation, and have one common right and one common interest, two or three, or more, may sue in their own name for the benefit of all; and on this principle large partnerships, or associations in the nature of joint-stock companies, though not incorporated are permitted to maintain suits instituted in the name of a few or more individuals interested on behalf of themselves and the other parties in the concern, *Cockburn v. Thompson*, 10 Ves. 321; *Blain v. Agar*, 1 Sim. 37.

4. Married Women.

As was formerly stated, one of the exceptions to the general rule that, every person may maintain a suit in Equity, was, that of persons labouring under disabilities, and among such were said to be married women and infants.

A married woman cannot, at law, sue except jointly with her husband; for she is deemed to be under his protection, and a suit respecting her rights or interests must be with the assent and co-operation of her husband. In Equity, a suit respecting the rights of a married woman, other than those in her separate estate, is brought by her and her husband jointly, and the bill is that of the husband, *Paullet v. Delaval*, 2 Ves. Sen 663.

But when she has a separate interest as co-plaintiff with her husband or being a defendant answers jointly with him, instead of suing by her next friend, or answering separately, the suit or defence is considered that of the husband alone, and will not prejudice any future claim by the wife, *Hughes v. Evans*, 1 S. & S. 185; *Mole v. Smith*, 1 J. & W. 665.

Where the suit relates to her separate property, the bill must be filed in the name of the wife, by her next friend, otherwise the defendant may

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take an objection for misjoinder of plaintiff, upon the ground, that she may at any future time institute a new suit for the same matter; and that upon such new suit being instituted, a decree in a cause over which the husband had the exclusive control and authority, would not operate as a valid bar against her subsequent claim, *Wake v. Parker*, 2 Keen, 59 and see *Warren v. Buck*, 4 Beav. 95, as to the time when the objection can be taken by the defendant. In practice the husband is sometimes made a co-plaintiff, but this is incorrect, and in all such cases the wife should sue, as sole plaintiff, by her next friend, and the husband should be made a party defendant, *Story's Eq. Pl.*, s. 63.

To authorize the filing of a bill by her next friend, her consent must be obtained, and if it is filed without her consent, it will be dismissed upon her affidavit of the matter, *Cooke v. Fryer*, 4 Beav. 13; unless she is an infant, when her consent is not necessary, *Wortham v. Pemberton*, 9 Jur. 291.

Where the bill is filed without a next friend, the proper motion, in the first instance, is that a next friend be appointed, and that in the meantime all proceedings in the suit be stayed, *McPherson v. McCabe*, 1 Cham. R. 250.

When the next friend of a married woman dies pending the suit, she may obtain an order to substitute a new one, and if she neglect to do so the defendant may move upon notice for an order that she do within a limited time name a next friend, or that the bill be dismissed with costs, *Barlee v. Barlee*, 1 S. & S. 100.

The next friend of a married woman must be a solvent person, capable of answering costs, and if he is not the Court will order the plaintiff to give security for costs, or appoint another next friend, *Rann v. Lawless*, 1 Cham. R. 333; *Vanwinkle v. Chaplin*, 2 Cham. R. 98.

As to the effect of Con. Stat. U. C., c. 73, respecting certain separate rights of property of married women, see *Royal Canadian Bank v. Mitchell*, 14 Gr. 412; *Chamberlain v. McDonald*, 14 Gr. 447.

5. Infants.

Although for many purposes an infant is under legal incapacity and disabilities, yet a suit may be maintained either at law or in equity, for the assertion of his rights, or for the security of his property, and for this purpose a child has been considered to have commenced its existence as soon as it is conceived in the womb. Under such circumstances it is termed in law an infant *en ventre sa mere*, and a suit may be sustained on its behalf, and the Court will, upon application in such suit, grant an injunction to restrain waste from being committed on its property, *Musgrave v. Parry*, 2 Vern. 710.

An infant may maintain a suit for the assertion of his rights, but he can do nothing which can bind himself to the performance of any act

therefore, where from the nature of the demand made by the infant it would follow that, if the relief sought were granted, the rules of mutuality would require something to be done on his part, such a suit cannot be maintained. Thus an infant cannot maintain a suit for a specific performance of a contract, because if a decree were to be made for a specific performance as prayed, on the part of the infant, the Court has no power to compel him to perform it on his part, either by paying the money or executing a conveyance, *Flight v. Bolland*, 4 Russ. 298.

Although an infant can in general maintain a suit, yet he is incapable of doing so without the assistance of some other person who may be responsible to the Court for the propriety of the suit, and who may be liable for the costs. Such person is called his next friend, and if a bill be filed on behalf of an infant without a next friend, the defendant may move to have it dismissed with costs, to be paid by the solicitor. It is not necessary that the next friend should be a relation of the infant, and although an infant has a guardian assigned him by the Court, or appointed by will, yet where he is plaintiff, the course is not to call the guardian by that name, but to call him the next friend.

Any person being at liberty to institute a suit on behalf of an infant, it sometimes happens that two or more suits are instituted in his name, by different persons, each acting as his next friend; in such cases the Court will direct an inquiry as to which suit is most for his benefit, and upon that being ascertained, will stay the proceedings in the other suit, and it is a motion of course that such a reference should be made. If upon the inquiry the second suit be deemed the more proper to be prosecuted, and the consequence is that there is one bill filed which it will be beneficial to prosecute, and a second bill filed which will be more beneficial, the ordinary practice is to stop the first suit, and to give costs to the next friend, *Starten v. Bartholomew*, 6 Beav. 143.

If it be represented that a cause preferred in the name of an infant is not for his benefit, the Court will order an inquiry concerning the propriety of the suit; and if upon such inquiry it is reported that the suit is not for the benefit of the infant, either the proceedings will be stayed, or else, if there be no excuse for the fact of the suit having been instituted, the bill will be dismissed with costs to be paid by the next friend, and where it appeared upon affidavits that the suit was commenced by the next friend, not for the benefit of the infant, but to promote his own views, the Court summarily and without an inquiry made such an order, *Sale v. Sale*, 1 Beav. 586; *Nalder v. Hawkins*, 2 M. & K. 243.

The reference as to the propriety of the suit will not be made on the application of the next friend himself, because the Court considers that, in commencing a suit, the next friend undertakes on his own part, that the suit is for the benefit of the infant, *Jones v. Powell*, 2 Mer. 141. But this rule applies only to cases where an application is made for such inquiry in the cause itself; if there be another cause pending by which the

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infant's property is subject to the control of the Court, such an inquiry is not only permitted, but is highly proper, when fairly and *bona fide* made, and may have the effect of entitling the next friend to repayment of his costs out of the infant's estate, even though the suit should turn out unfortunate, and the bill be dismissed with costs, *Taner v. Ivis*, 2 Ves. Sen. 466.

Although an infant defendant, where his inheritance is concerned, has in general a day given him after attaining twenty-one, to show cause, if he can, against the decree, an infant plaintiff has no such privilege, but is as much bound by a decree in a suit on his behalf, as one of full age, *Morrison v. Morrison*, 4 M. & C. 216; *Lord Brook v. Lord Hertford*, 2 P. Wms. 519.

A person having filed a bill as next friend of an infant, cannot withdraw himself and substitute another next friend without a reference to enquire whether it is for the benefit of the infant that such substitution should take place, *Melling v. Melling*, 4 Mad. 261; in general a next friend will not be allowed to retire without giving security for the costs already incurred.

When the next friend of an infant dies pending the suit, the proper course of proceeding is for the solicitor of the plaintiff to apply to the Court for leave to appoint a new next friend in his stead; and after such appointment, the name of the new next friend should be made use of in all the subsequent proceedings. If the plaintiff's solicitor omits to take the step within a reasonable time, the Court will, upon motion or petition, approve of a new next friend, and notice of the order will be directed to be given to the plaintiff's solicitor, *Lancaster v. Thornton*, Amb. 398; *Bracey v. Sandiford*, 3 Mad. 463; and the proper order to move for, is that a new next friend may be appointed in Chambers or by the Master, not that the infant do name one, or the bill be dismissed, *Glover v. Webb*, 12 Sim. 351.

The next friend of any infant sole plaintiff, should not take any step in the cause, in the name of the plaintiff after the infant attains twenty-one, *Brown v. Weatherhead*, 4 Hare, 122; for the infant may on attaining his majority, abandon the suit. But if the infant adopt the proceedings after he comes of age, he becomes liable for all the costs of the suit.

53. No suit is to be dismissed by reason only of the misjoinder of persons as plaintiffs therein. (3rd June, 1853; Ord. 31.)

This and the two following orders are a copy of the Imp. Act 15 & 1, Vic. c. 86, s. 49.

As to misjoinder before this order, see *Lambert v. Hu'chinson*, 1 Beav. 277; *Eades v. Harris*, 1 Y. & C. C. C. 230.

These orders apply to plaintiffs not named, as where a shareholder files a bill on behalf of himself and others, *Clement v. Bowes*, 1 Drew. 684; but not where full justice cannot be done to the defendant in the absence of the shareholders, *Williams v. Salmond*, 2 K. & J. 463.

As to misjoinder in a suit impeaching a settlement of accounts of an association, see *Stupart v. Arrowsmith*, 3 Sm. & G. 176.

Bill dismissed where one only of the plaintiffs had an interest to maintain the suit, and that interest was not claimed by the bill, *Barton v. Barton*, 3 K. & J. 512. As to misjoinder in a suit by some shareholders to recover money wrongfully paid to defendants and other shareholders, see *Williams v. Page*, 24 Beav. 654; as to parties to suits by shareholders generally, see *Carlisle v. South Eastern Railway*, 1 Mac. & G. 689.

A bill by a wife suing by her next friend in respect of her separate estate is not demurrable, because the husband, having no adverse interest, joins as a co-plaintiff, *Beardmore v. Gregory*, 2 H. & M. 491; but see *Hope v. Fox*, 1 J. & H. 456; *Smith v. Etchell*, 1 H. & M. 558. See also as to misjoinder, *Evans v. Coventry*, 3 Drew. 75; on appeal, 5 D. M. & G. 911, 918; *Beeching v. Lloyd*, 3 Drew. 227; *Carter v. Sanders*, 2 Drew. 248.

54. Wherever it appears to the Court that notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the Court may grant such relief, and may modify the decree according to the special circumstances of the case; and for that purpose is to direct such amendments, if any, as may be necessary; and at the hearing, before such amendments are made, may treat any one or more of the plaintiffs as if he or they were defendant or defendants in the suit, and the remaining or other plaintiffs was or were the only plaintiff or plaintiffs on the record. (3rd June, 1853; Ord. 31.)

55. Where there is a misjoinder of plaintiffs, and the plaintiff who has an interest has died, leaving a plaintiff on the record without any interest, the Court may, at the hearing of the cause, order such an amendment of the record as may appear just, and proceed to a decision

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of the cause, if it shall see fit; and give such directions as to costs or otherwise as may appear just and expedient. (3rd June, 1853; Ord. 31.)

56. Where, in any suit or other proceeding, it is made to appear that a deceased person who was interested in the matters in question has no legal personal representative, the Court may either proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court may think fit, either specially, or by public advertisement; and the order so made, and any orders consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court. (3rd June, 1853; Ord. 30.) (*Imp. Act 15 & 16 V. c. 86, s. 44.*)

To induce the Court to act under this order, it is necessary that the interest of the deceased defendant in the matters in question in the suit should be of little consequence, and that there should be difficulty in obtaining representation to his estate, *Daniel's Chan. Pr.* 197. This order does not apply where parties have a beneficial and substantial interest, but applies only to cases of mere formal parties, *Sherwood v. Free-land*, 6 Grant, 203; *Toronto Savings Bank v. Canada Life Assurance Company*, 18 Grant, 171.

Thus, creditors under a trust deed for their benefit, may proceed against the trustees without a personal representative of the deceased debtor, the author of the trust, where no such representative exists and the estate is insolvent, *Chaffers v. Headlam*, 9 Hare, App. 46; *Davis v. Boulcot*, 1 Drew. & Sm. 23; and where one of the executors of the testatrix in the cause had died intestate and insolvent, and ineffectual attempts had been made to obtain representatives to him, the Court allowed an administration suit to proceed in the absence of such representation, *Band v. Randle*, 2 W. R. 331.

As a general rule the Court will incline to act under this order, when the next of kin expressly refuses to administer, *Haw v. Vickers*, 1 W. R. 242; *Tarrett v. Lloyd*, 2 Jur. N. S. 371; or pays no attention to a notice calling on him to administer, *Whiteaves v. Melville*, 5 W. R. 676; or where the interests of the deceased are identical with those of the plaintiff, *Cox v. Taylor*, 23 L. J. Ch. 910; *Long v. Storie*, Kay. App. 12.

This order does not apply when the personal representative would have active duties to perform, *Fowler v. Bayldon*, 9 Hare, App. 78; nor when he would represent interests adverse to the plaintiff, *Headen v. Emmott*, 22 L. T. 166; *Dean of Ely v. Gayford*, 16 Beav. 561; *Gibson v. Wills*, 21 Beav. 620; nor where the object of the suit is to administer the estate of the intestate, *Silver v. Stein*, 1 Drew, 295; *Grove v. Lane*, 16 Jur. 1061; *James v. Aston*, 2 Jur. N. S. 224; *Donald v. Bather*, 16 Beav. 26; *McLean v. Dawson*, 27 Beav. 21; but see *Jones v. Foulk*, 10 W. R. 55.

Where the entire adverse interest is unrepresented, the Court will not appoint a person to represent that interest, *Gibson v. Wills*, 21 Beav. 620; *Cox v. Stephens*, 11 W. R. 929; and it will not under this order appoint a person to receive a sum of money in Court, payable to a deceased person, though the amount be small, *Rawlins v. McMahon*, 1 Drew. 225; *Williams v. Allen*, 32 Beav. 650; and where a representative has been appointed in the suit, the Court will not order payment to him, but carry the money to a separate account, *Byam v. Sutton*, 19 Beav. 646.

As to cases where a will has been proved abroad, see *Hewitson v. Todhunter*, 22 L. J. Ch. 76; *Sutherland v. De Vienne*, 2 Jur. N. S. 301; a defendant in an administration suit died abroad, his executors having proved his will at the place of his death, refused to prove it in England, an order was made for appointment of a representative of the deceased, *Bliss v. Putnam*, 7 Jur. N. S. 12. A person cannot be appointed to represent an estate under this order, without his consent, *Prince of Wales Co. v. Palmer*, 25 Beav. 605.

The proper person to be appointed is the person who would be appointed administrator *ad litem*, *Dean of Ely v. Gayford*, 16 Beav. 561.

As to authority conferred by administration *ad litem*, see *Williams on Exors.* 433.

For the form of order under this order, see *Heley v. Lord Bezeley*, 15 Beav. 340; *Whittington v. Gooding*, 10 Hare, App. 29.

57. Where questions arise between parties, who are some only of those interested in the property respecting which the question arises; or where the property in question is comprised with other property in the same settlement, will, or other instrument, or is the property of an intestate, the Court may adjudicate on the ques-

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tions arising between such parties, without making the other parties interested in the property respecting which the question arises, or interested under the settlement, will, or other instrument, parties to the suit; and without requiring the whole trusts and purposes of the settlement, will, or instrument, or the whole estate of the intestate, to be executed or administered under the direction of the Court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions have arisen or of the whole estate or assets; but where the Court is of opinion that the application is fraudulent, or collusive, or that for some other reason the application ought not to be entertained, it may refuse to make the order prayed. (3rd June, 1853; Ord. 29.) (*Imp. Act 15 & 16 V. c. 86, s. 51.*)

This order applies to a petition under the Trustee Act, presented by some only of the persons beneficially interested in a trust fund, *Re Sharpley*, 1 W. R. 271; and to a special case, *Re Browne*, 29 Beav. 401.

This order applies only when some of the persons interested in the question at issue, in every point of view, are before the Court, *Swallow v. Biins*, 9 Hare, App. 47.

The Court may direct the administration of one or more specific trusts created by an instrument, without directing the performance of all, *Parrell v. Hingston*, 3 Sm. & G. 387; *Prentice v. Prentice*, 10 Hare, App. 23; but the Court cannot make a decree for foreclosure or sale in the absence of a party entitled to one third of the equity of redemption, *Caddick v. Cook*, 32 Beav. 70.

A party will not be allowed to proceed with a case under this section by striking out of the record the names of some of the defendants (who are out of the jurisdiction,) and proceeding with them, *Lanham v. Pirie*, 2 Jur. N. S. 1201.

A decree made under this order does not bind the absent parties, as Ord. 6, s. 2, does when notice of the decree has been served upon them, *Doody v. Higgins*, 9 Hare, App. 82.

58. It shall not be competent to a defendant to take an objection for want of parties in any case to which the seven rules next hereinafter set forth apply. (3rd June, 1853; Ord. 6, s. 2.) ✓ x

As to proceeding against some of several persons jointly and severally liable, see *Ord.* 62.

As to cases in which a decree may be made saving the rights of absent parties, see *Ord.* 65.

Rule 1.—A residuary legatee, or next of kin, may have a decree for the administration of the personal estate of a deceased person, without serving the remaining residuary legatees or next of kin. (*Imp. Act 15 & 16 V. c. 86, s. 42, r. 1.*)

Rule 2.—A legatee interested in a legacy charged upon real estate; or a person interested in the proceeds of real estate directed to be sold, may have a decree for the administration of the estate of a deceased person, without serving any other legatee or person interested in the proceeds of the estate. (*Imp. Act 15 & 16 V. c. 86, s. 42, r. 2.*)

Rule 3.—A residuary devisee or heir, may have the like decree, without serving any co-residuary devisee or co-heir.

Where residuary devisees who had died abroad before the institution of the suit, were made parties in ignorance of their death, the suit may be proceeded with without making their real representatives parties *Bateman v. Cooke*, 1 W. R. 242.

As to making several of a numerous class represent the class both as plaintiffs and defendants, see *Bromley v. Williams*, 32 Beav. 177.

Rule 4.—One of several *cestuis que trust*, under a deed or instrument, may have a decree for the execution of the trust of the deed or instrument, without serving any other of such *cestuis que trust*. (*Imp. Act 15 & 16 V., c. 86, s. 42, r. 4.*)

Decree for the appointment of new trustees and conveyance of the trust estate, in a suit by some of the *cestuis que trust*, and a direction to serve the others with notice of the decree, *Jones v. James*, 9 Hare, App. 80.

Money recovered from a trustee in a suit by *cestui que trust* to repair breach of trust as to one share of the trust estate, *McLeod v. Annesley*, 18 Beav., 600. If the whole fund be not forthcoming owing to a breach of

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trust, a party entitled to a moiety, although ascertained, cannot sue for payment without making the person entitled to the other moiety a party, *Lenaghan v. Smith*, 2 Phill., 301; *Munch v. Cockerill*, 8 Sim., 219. Where *cestuis que trust* by their conduct have made themselves trustees, they ought to be parties, *Jesse v. Bennett*, 6 D. M. & G., 609. Strangers who have aided in misapplying funds, held to be properly made parties, *Lund v. Blanchard*, 4 Hare, 9.

Rule 5.—In all cases of suits for the protection of property pending litigation, and in all cases in the nature of *waste*, one person may move on behalf of himself, and of all persons having the same interest. (*Imp. Act 15 & 16 V., c. 86, s. 42, r. 5.*)

Rule 6.—An executor, administrator, or trustee, may obtain a decree against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate, or the execution of the trusts. (*Imp. Act 15 & 16 V., c. 86, s. 42, r. 6.*)

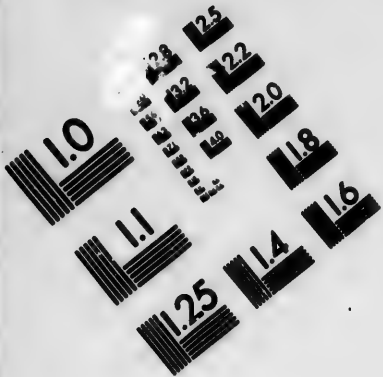
Before this rule a trustee might file a bill against one of several *cestuis que trust*, to recover the trust securities without making the other *cestuis que trust* parties, *Bridget v. Hames*, 1 Coll. 72.

Rule 7.—An assignee of a chose in action may institute a suit in respect thereof without making the assignor a party thereto.

✦ **59.** In all the above cases the Court, if it sees fit, may require any other person to be made a party to the suit, and may, if it sees fit, give the conduct of the suit to such person as it deems proper; and may make such order in any particular case as it deems just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matter in question. (3rd June, 1853; Ord. 6, s. 2.) (*Imp. Act 15 & 16 V., c. 86, s. 42, r. 7.*)

✦ **60.** In all the above cases the persons who, according to the practice of the Court, would be necessary parties





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to the suit, are to be served with an office copy of the decree (unless the Court dispenses with such service) endorsed with the notice set forth in schedule A, hereunder written, and after such service, they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and upon service of notice upon the plaintiff, they may attend the proceedings under the decree. Any party so served may apply to the Court to add to, vary, or set aside the decree, within fourteen days from the date of such service. (3rd June, 1853; Ord. 6, s. 2.)

This rule as to serving parties applies to infants, *Clarke v. Clarke*, 20 L. T. 88; and to parties out of the jurisdiction, *Chalmers v. Lawrie*, 10 Hare, App. 27; *Mayberry v. Brooking*, 7 D. M. & G. 673; *Strong v. Moore*, 22 L. J. Ch. 917.

By the endorsement to be made on the office copy of the decree, the person served is notified that he must attend, or proceedings may be taken in his absence; no order for leave to attend is necessary.

In an administration suit by a residuary legatee, other residuary legatees, served with notice of the decree and having liberty to attend the proceedings, will not be allowed their costs of attending the taking of the awards, unless the plaintiff and the accounting defendant employ the same solicitor, and in that case will be allowed one set of costs between them, *Daubney v. Leake*, 1 L. R. Eq. 495.

Persons who at the date of the decree had no interest in the suit cannot be brought before the Court under this order, *Colyer v. Colyer*, 11 W. R. 355.

Where a party served with an office copy of the decree feels aggrieved thereby, he should move upon notice for leave to present a petition in the nature of a bill of review, *Kidd v. Cheyne*, 18 Jur. 348; he may appeal against the decree, *Ellison v. Thomas*, 1 D. J. & S. 18.

+ 61. In all suits concerning real or personal estate which is vested in trustees under a will, settlement, or otherwise, the trustees shall represent the persons beneficially interested under the trust, in the same manner and to the same extent as executors or administrators, in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such case it shall not be necessary to make the persons beneficially

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interested under the trusts parties to the suit; but, on the hearing, the Court, if it think fit, may order such persons, or any of them, to be made parties. (3rd June, 1853; Ord. 6, r. 7.)

On an application by a creditor in an administration suit, for the sale of real estate of the testator, the executors, to whom part of the real estate was devised, were held sufficiently to represent the parties interested in the real estate, for the purposes of motion; and the order was granted, with a direction that an office copy should be served on each of the parties interested in the real estate, *Stewart v. Hunter*, 14 Gr. 132.

The operation of this rule is not confined to administration suits, *Fowler v. Bayldon*, 9 Hare, App. 78. But in applying it generally, the Court will exercise the discretion given by the concluding clause, *Tudor v. Morris*, 22 L. J. Ch. 1051; and see *Dickson v. Draper*, 11 Gr. 362; *Cropper v. Mellersh*, 24 L. J. Ch. 430; *Wilkins v. Reeves*, 3 W. R. 305. As to the distinction between infant and adult *cestui que trusts*, vide *Goldsmid v. Stonehewer*, 17 Jur. 199; 9 Hare, App. 38; and see *Stiffen v. Davis*, Kay, App. 21; *Sale v. Kitson*, 3 D. M. & G. 119; *Hanman v. Riley*, 9 Hare, App. 40. The rule does not apply where the trustees have disclaimed, *Young v. Ward*, 10 Hare, App. 58.

If the bill be filed to set aside a settlement, the trustees do not sufficiently represent their *cestui que trust*, *Reed v. Prest*, 1 K. & J. 183; *Rogers v. Rogers*, 2 Grant, 137; *Thomas v. Torrance*, 1 Cham. R. 48; or, where bill is against trustees by parties claiming adversely to *cestui que trusts*, *Cleveland v. McDonald*, 1 Grant, 415; and see *Payne v. Parker*, 1 L. R. Ch. 327.

Executors with power of sale are within this section, *Shaw v. Hardingham*, 2 W. R. 657; and devisees on trust subject to payment of debts *Smith v. Andrews*, 4 W. R. 353. Where there was only an implied power of sale in the executrix, she was held not a trustee under this order, *Bolton v. Stannard*, 6 W. R. 570.

In a suit to redeem, *cestuis que trust* of the mortgage money required to be parties, *Stansfield v. Hobson*, 16 Beav. 189. New trustees of a fund in Court to whom it had been assigned, necessary parties to a suit by an encumbrancer of it, *Nelson v. Seaman*, 1 D. F. & J., 368.

A friendly society which had no treasurer or board to represent it, and had become insolvent, and long since ceased to exist, was held to be sufficiently represented on the record by the trustees, *Pare v. Clegg*, 29 Beav. 589.

62. Where the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as par-

ties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable. (3rd June, 1853; Ord. 6, r. 8.) (*Eng. Con. Ord.* 7, r. 2.)

As to parties to a suit against trustees of a creditors' deed, see *Bateman v. Margerison*, 3 Hare, 496. Where the owner of an equity of redemption assigns it in trust for the benefit of creditors, the creditors are not necessary parties to a bill of foreclosure, *Shaw v. Liddell*, 1 U. C. L. J., 57; but the decree usually directs the master to notify some of the creditors of the proceedings in his office.

On a bill for redemption of property vested in trustees under an absolute deed intended as a mortgage, one of the trustees being beneficially interested; held, that the *cestui que trusts* were sufficiently represented, *Kerr v. Murray*, 6 Grant, 343; on a bill by trustees to foreclose a mortgage made for the benefit of creditors, the creditors are not necessary parties, *Fraser v. Sutherland*, 2 Grant 442. A suit charging breach of trust cannot proceed in the absence of representatives of one of the trustees liable to contribute, *Deaynes v. Robinson*, 24 Beav. 86; and see *Shipton v. Rawlins*, 4 Hare, 619.

See as to proceedings against some only of the parties to a breach of trust, *May v. Selby*, 1 Y. & C. Ch. 235; *Phillipson v. Gatty*, 6 Hare, 26; *Simes v. Eyre*, 6 Hare, 137; *Horsley v. Fawcett*, 11 Beav. 565; *Fowler v. Reynal*, 2 DeG. & S. 749.

This order applies to breaches of trust, *Kellaway v. Johnson*, 5 Beav. 319; *Perry v. Knott*, 5 Beav. 293; and to an information against public trustees, *Attorney-General v. Pearson*, 2 Coll. 581; *Attorney-General v. Corporation of Leicester*, 7 Beav. 176.

Where a surety files a bill to set aside a bond, the principal and co-surety are both necessary parties, *Allan v. Houlden*, 6 Beav. 148; sureties cannot be sued without their principals, *Pierson v. Barclay*, 2 DeG. & S. 746; *Lloyd v. Smith*, 13 Sim. 457; *Seidler v. Sheppard*, 12 Gr. 458; *Ockburn v. Gillespie*, 11 Gr. 465; but plaintiff may elect against which of two principals or which of two sureties he will proceed, *Lloyd v. Smith*, 7 Jur. 460; see *Wilson v. Goodman*, 4 Hare, 63.

This order does not allow a partnership debt to be recovered against one partner's representative without making a surviving partner a party, *Hills v. McRae*, 9 Ha. 297; *Cox v. Stephens*, 2 N. R. 506; but see *Haig v. Grey*, 3 DeG. & Sm. 741; *Thorpe v. Jackson*, 2 Y. & C. 553.

Where a bill, besides charging surviving executor with breach of trust, seeks account of personal estate of testator, personal representatives of deceased executor must be parties, *Biggs v. Penn*, 9 Jur. 368; see remarks on this case, *Shipton v. Rawlins*, 4 Hare, 619. In an administra-

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tion suit all persons liable must be parties, *Hall v. Austin*, 10 Jur. 452; but where two classes of trustees committed reach of trust *cestuis que trust* may proceed against one class only, *McGachen v. Dew*, 15 Beav. 84.

After a bill is filed against all the trustees it cannot, at the hearing, be dismissed by plaintiff against one of them, *Fussel v. Elwin*, 18 Jur. 333; and see *London Gas Co. v. Spottiswood*, 14 Beav. 264.

As to parties in respect of joint and several demands, see further *Mayor of Berwick v. Murray*, 5 W. R. 208; *Colby v. Hawkins*, 6 Jur. 162; *McIntyre v. Connell*, 1 Sim. N. S. 252.

63. Where a bill is filed against a Corporation aggregate, no officer of the Corporation is to be made a defendant for discovery only; but any officer who might by the former practice have been made a defendant for the purpose of discovery may be examined by the plaintiff in the same way as a party, after the answer of the Corporation is filed, or after the time for filing the same has expired. (20th Dec. 1865; Ord. 5.)

64. Where a bill is filed by a Corporation aggregate the defendant may, after filing his answer, examine for discovery such officer of the Corporation as would under the former practice have been made a party defendant to a cross bill filed for discovery.

65. Where a defendant, at the hearing of a cause, objects that a suit is defective for want of parties, the Court, if it thinks fit, may make a decree saving the rights of the absent parties. 20th Dec. 1865; Ord. 15.)

Decree in the absence of the assignees of a bankrupt, *Mayberry v. Brookings*, 7 D. M. & G. 673; of the heir at law of a surviving trustee, *Faulkner v. Daniel*, 3 Ha. 199; of a mortgagee, *Fulton v. Clark*, 1 DeG. & Sm. 307; of a person entitled upon a remote contingency, *Daubuz v. Peel*, 1 Coop. temp. Cottenham, 865.

The husband of a female plaintiff or defendant is not within the rule. *Russell v. Lucy*, 18 L. J. Ch. 484.

As to making a decree on appeal, in the absence of some of the parties, see *Goulden v. Cumm*, 29 L. J. Ch. 135.

V.—PLEADINGS, AND WRITTEN PROCEEDINGS GENERALLY.

66. Pleadings and all other proceedings in a cause may be written or printed, or partly written and partly printed; and where wholly printed, dates and sums occurring therein are to be expressed by figures instead of words. (6th Feb. 1865; Ord. 1 and 2.)

Where the office copy of the bill served upon a defendant was not printed in accordance with these orders, the service was set aside with costs, *Cossey v. Ducklow*, 2 Cham. R. 227; 4 U. C. L. J. N. S. 17; although the Registrar may have filed a bill not printed in accordance with the orders of Court, a motion to take the bill off the files for such non-compliance may be made. *Ibid.*

67. All pleadings and other proceedings are to be written or printed neatly and legibly on good paper, of the size and form heretofore in use; and if printed, the same are to be printed with pica type leaded; and the solicitor is not to be entitled to the costs of any pleading or other proceeding which is not in conformity with this Order; and the Clerk of Records and Writs or Deputy Registrar is to refuse to file the same. (6th Feb. 1865; Ord. 3.)

By two English orders of 1660 and 1666, no plea, answer or affidavit is to be filed in which there is any knife erasure, or which is blotted so as to obliterate any word, or which is improperly written, or so altered as to cause any material disfigurement, or in which there is any interlineation of any word or words, unless the person before whom the same is sworn duly authenticate such interlineation with his initials, in such manner as to show that the interlineation was made before the plea, answer or affidavit was sworn, and so as to mark the extent of such interlineation. These orders are in force here.

Affidavit containing unauthenticated interlineation of Christian names allowed to be filed, *Vorweig v. Barweiss*, 3 W. R. 259; erasures in recital of contents of exhibit held immaterial, *Savage v. Hutchinson*, 24 L. J. Ch. 232.

68. Every bill, answer and petition filed, and every affidavit to be used in any cause or matter, is to be

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divided into paragraphs, and every paragraph numbered consecutively, and, as nearly as may be, is to be confined to a distinct portion of the subject. No costs are to be allowed for any bill, answer, petition or affidavit, or part of any bill, answer, petition or affidavit, substantially violating this order; nor shall any affidavit violating this order be used in support of, or opposition to, any motion, without the express permission of the Court. (13th April, 1859; Ord. 4.)

69. If upon the hearing of a cause or matter the Court is of opinion that any pleading, petition, or affidavit, or any part of such pleading, petition, or affidavit is scandalous, the Court may order such pleading, petition or affidavit to be taken off the file, or may direct the scandalous matter to be expunged, and is to give such direction as to costs as it may think right. (23rd Dec. 1857; Ord. 3, s. 9.)

Nothing is scandalous that is relevant to the merits, *Fenhoulet v. Passavant*, 2 Ves. Sen. 24; *Lord St. John v. Lady St. John*, 11 Ves. 526; *Coffin v. Cooper*, 6 Ves. 514; *Anon*, 1 M. & C. 78; *Everett v. Prythergh*, 12 Sim. 363; 6 Jur. 3. Bill containing scandalous matter ordered to be taken off the file, by consent of all parties. *Makepeace v. Romieux*, 8 W. R. 687; *Clifton v. Bentall*, 9 Beav. 105. Scandalous affidavit taken off the file, *Goddard v. Parr*, 24 L. J. Ch. 783; scandalous matter expunged. *Re Bailey's Settlement*, 3 W. R. 183.

Costs of exceptions for scandal are in the discretion of the Court, but usually follow the result; and such costs are payable immediately, *Morgan & Davey*, 27; and as between solicitor and client, *Ex parte Thorp*, 1 Ves. 394; *ex parte Porter*, 2 M. & A. 220.

An affidavit in bankruptcy taken off the files, as scandalous and impertinent, with costs against the solicitor who made it, as between solicitor and client, *Ex parte Simpson*, 15 Ves. 476; counsel and agent held liable for costs on account of scandal and impertinence, *Rattray v. George*, 16 Ves. 232; and see *Bishop v. Willis*, 5 Beav. 83.

As to what will be considered impertinence, see *Davis v. Cripps*, 2 Y. & C. C. C. 485; *Tench v. Cheese*, 1 Beav. 571; *Byde v. Masterman*, Cr. & Ph. 265; *Langley v. Fisher*, 10 Sim. 345; *Attorney-General v. Foster*, 2 Ha. 81; *Devaynes v. Morris*, 1 M. & C. 213; *Woods v. Woods*, 10 Sim. 197.

Affidavits referred for impertinence, *Keeling v. Hosking*, 2 Russ. 319; *Bickford v. Skewes*, 9 Sim. 428; *Re Burton*, 1 Russ. 380.

70. A motion to have any pleading, petition, or affidavit taken off the file for scandal, or to have the scandalous matter expunged, may be made at any time before the hearing of the cause or matter. (23rd. Dec. 1857; Ord. 3, s. 10.)

Where an answer is in the opinion of the Court *prima facie* scandalous on its face, the onus rests with the party filing it to shew its relevancy to the question raised by the bill, *Ruttan v. Smith*, 1 Cham. R. 184; filing a replication waives all irregularities in an answer, but does not waive scandal therein, *Ibid*.

The plaintiff and his counsel ordered to pay costs for a scandalous bill, *Emerson v. Dallion*, 1 Ch. Rep. 184.

71. If upon the hearing of a cause or matter, the Court is of opinion that any pleading, petition, or affidavit is of unnecessary length, the Court may either direct payment of a sum in gross or in lieu of taxed costs therefor, or it may direct the taxing officer to look into such pleading, petition, or affidavit, and to distinguish what part or parts thereof is or are of unnecessary length, and to ascertain the costs occasioned to any party by any unnecessary matter, and the Court is to make such order as it thinks just, for the payment, set-off, or other allowance of such costs, by the party or his solicitor. (23rd Dec. 1857; Ord. 3, s. 11.)

Under the common order to tax the taxing officer does not look into pleadings to distinguish what parts are unnecessary, unless directed, *Re Farrington*, 33 Beav. 346. For form of direction to taxing officer, see *Burchall v. Giles*, 11 Beav. 34; *Woods v. Woods*, 5 Ha. 229; *Re Bedmington Charities*, 12 Jur. 665; *Hanslip v. Kitton*, 8 Jur. N. S. 885.

The direction to the taxing officer is itself an intimation that the Court considers the pleading or affidavit of unnecessary length, *Re Skidmore*, 1 Jur. N. S. 696. For instances of unnecessary length in pleadings, see *Byde v. Masterman*, Cr. & Ph. 265; *Tench v. Cheese*, 1 Beav. 571; *Norway v. Rowe*, 1 Mer. 347; *Davis v. Cripps*, 2 Y. & C. O. C. 435; *Attorney-General v. Foster*, 2 Ha. 81; *Scottish Union Insurance Company v. Steele*, 9 L. T. N. S. 677; and in petitions, *Re Manchester and Leeds Railway Com-*

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72. All the pleadings in any cause must be filed at the same office. (3rd June, 1853; Ord 44, s. 2.)

73. Every paper to be filed in the office of the Clerk of Records and Writs is to be distinctly marked at or near the top or upper part thereof on the outside, with the name of the City or Town in which the bill is filed. And the Clerk of Records and Writs is not to file any paper which is not so marked. (1st April, 1867; Ord. 1.)

VI.—BILLS.

74. A bill of complaint is to be in the form of a petition, addressed, "To the Honourable the Judges of the Court of Chancery." It must contain :

1. The name and description of each party complainant ;
2. The name of each party defendant ;
3. The name of the place at which witnesses are intended to be examined ;
3. A statement of the plaintiff's case in clear and concise language ;
4. A prayer for the specific relief to which the plaintiff supposes himself entitled ; but the prayer for general relief may be added. (3rd June, 1853; Ord. 9, s. 1 ; 10th Jan. 1863 ; Ord. 5.)

Bills may be written or printed, or partly written and partly printed ; and where wholly printed dates and sums are to be expressed by figures instead of words, *Ord. 66.*

As to the kind of type in which bills are to be printed, see *Ord. 67.*

They must be divided into paragraphs, each of which is to be confined as nearly as may be, to a distinct portion of the subject ; the paragraphs must be numbered consecutively, and no costs are to be allowed for any bill which does not comply with these requirements, *Ord. 68.*

The plaintiff's abode and description must be stated accurately, that the defendant may know where to resort to compel obedience to any order of the Court, and to enforce payment of any costs awarded against the plaintiff.

On a motion to take a bill off the files for irregularity, the description of the plaintiff being omitted, leave was given to amend on payment of costs, *Hill v. Maguire*, V. C. Esten, 7th Feb. 1862; on a motion for security for costs, on the ground that plaintiff's address was omitted, leave given to amend, *Dick v. Munden*, 13 W. R. 1013.

A plaintiff who gives a fictitious address, or whose residence cannot be found will be ordered to give security for costs, *Sandy v. Long*, 7 Sim. 140; 2 M. & K. 487; and see *Calvert v. Day*, 2 Y. & C. Ex. 217.

The abode and description of the next friend of an infant or married woman, must be stated in the bill, *Major v. Arnott*, 2 Jur. N.S. 80.

The word "bill" includes a petition, *Ord. 7*.

The Attorney-General must sign and sanction an information before it is filed or amended, *Attorney-General v. Fellows*, 1 J. & W. 254; *Attorney-General v. The Toronto Street Railway Co.* 2 Cham. R. 162.

A bill improperly filed without the client's sanction, will be ordered to be taken off the files with costs to be paid by the solicitor; *Jerdein v. Bright*, 10 W. R. 380; *Re Thompson*, 25 Beav. 245; as to bill filed in the name of a company but without their sanction, see *East Pant &c., Mining Co. v. Merryweather*, 18 W. R. 216.

75. In the cases enumerated in schedule B hereunder written, the bill of complaint may be in the form, or to the effect, set forth in that schedule as applicable to the particular case; and, in cases not enumerated in that schedule, forms of pleading similar in principle may be adopted whenever a more detailed statement is not necessary for the full development of the case. (3rd June, 1853; Ord. 9, s. 1.)

76. A bill of complaint is not to contain any interrogatories; all merely formal parts, except the address and conclusion, are to be omitted; and the signature of counsel is unnecessary. (3rd June, 1853; Ord. 9, s. 1.)

77. A bill of complaint may be filed either with the Clerk of Records and Writs or with a Deputy Registrar, at the option of the plaintiff; and the filing of a bill of

complaint shall have the same effect as the filing of a bill and the issuing of a subpoena to appear and answer formerly had. (3rd June, 1853; Ord. 9, s. 2.)

All the pleadings are to be filed in the same office, *Ord. 72*; but all affidavits in support of, or in opposition to any special motion or petition, must be filed with the Clerk of Records and Writs, *Ord. 260*.

The name or firm and place of business of the solicitor or solicitors filing any bill must be endorsed thereon, and if the solicitor is acting as agent only, then the name or firm and place of business of the principal solicitor must also be endorsed, *Ord. 40*.

The filing of a bill, or the taking of a proceeding, in which bill or proceeding any title or interest in land is brought in question, shall not be deemed notice of the bill or proceeding to any person not a party thereto, until a certificate by the Registrar or a Deputy Registrar of the Court has been registered in the Registry Office of the County in which the land is situated; but no certificate is required to be registered of a suit or proceeding for the foreclosure of a registered mortgage, *Con. Stat. U. C. c. 12, s. 64*. As to *lis pendens*, see *Anon*, 1 Vern. 318; *Bishop of Winchester v. Payne*, 11 Ves. 194; *Bellamy v. Sabine*, 1 D. & J. 566. To affect a man with a *lis pendens* there ought to be a continued prosecution, *Preston v. Tubbin*, 1 Vern. 286; *Kinsman v. Kinsman*, 9 L. J. Ch. 276.

As to effect of filing a bill in saving Statute of Limitations, see *Coppin v. Gray*, 1 Y. & C. C. O. 205; *Foster v. Thompson*, 4 Dru. & War. 303; *Boyd v. Higginson*, F. & K. 603; *Bampton v. Birchall*, 5 Beav. 67; *Dixon v. Gayfers*, 17 Beav. 421.

Where a certificate of *lis pendens* has been registered and the bill is afterwards dismissed, it is not necessary to obtain an order discharging the certificate of *lis pendens* from the registry; the registration of the decree dismissing the bill being sufficient for all purposes, *Dexter v. Cosford*, 1 Cham. R. 22.

78. Orders of course to amend a bill of complaint may be obtained at any time before answer, upon precipe. (3rd June, 1853; Ord. 9, s. 9.)

Where plaintiff amends not requiring further answer, that should be stated in the order to amend, *Boddington v. Woodley*, 9 Sim. 380.

After the order is made and before service of it, the defendant may file a demurrer, *Price v. Webb*, 2 Hare, 515. Plaintiff is not by omitting to amend within the fourteen days, precluded from obtaining a fresh order, *Nicholson v. Peile*, 2 Beav. 497; and there may be any number of such orders before answer, *Wharton v. Swann*, 2 M. & K. 362.

79. Service upon a defendant of an order of course to amend before answer, may be dispensed with upon an application *ex parte*, where the Court is satisfied that such an order may be made without prejudice to the defendant's rights; and where service upon a defendant of an order to amend is dispensed with, the cause as to such defendant is to proceed as if the bill had been originally filed in the amended form. (3rd June, 1853; Ord. 9, s. 10.)

80. An order to amend the bill, for the purpose of rectifying a clerical error in names, dates, or sums only, may be obtained at any time upon precipe. (3rd June, 1853; Ord. 9, s. 11.)

Leave given to amend a bill by striking out a defendant's maiden name without re-serving the bill, *Barnes v. Ridgway*, 1 Sm. & G. App. 18.

Amendments under this section render inoperative an order to take a bill, *pro confesso*, *Weightman v. Powell*, 2 DeG. & S. 570.

An order of course may be obtained after replication to amend by adding parties where no new issue is thereby tendered, *Brian v. Waistell*, Kay, App. 47; *Brattle v. Waterman*, 4 Sim. 125; and see *Johnson v. Cowan*, 2 Cham. R. 18.

81. One order of course to amend the bill, as the plaintiff may be advised, may be obtained by the plaintiff upon precipe, at any time before filing the replication, and within four weeks after the answer, or the last of several answers, has been filed; but no further order of course for leave to amend the bill is to be granted after an answer has been filed, except in the case provided for by Order 80. (3rd June, 1853; Ord. 2, s. 12.)

Under the common order to amend the plaintiff cannot entirely change the nature of the bill, *Smith v. Smith*, Geo. Coop. 141; nor amend a bill for discovery, by praying relief, *Butterworth v. Batley*, 15 Ves. 358. Where a bill was filed by a mortgagee to foreclose a mortgage, a motion to amend by impeaching a conveyance made by the mortgagor to his son as fraudulent and void was refused, *Crawford v. Bradburn*, 1 Cham. R. 280.

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except upon payment of costs. The common form of order giving defendant leave to amend as he may be advised, does not authorize a plaintiff to strike out the name of a party on the record.

The name of a plaintiff may be struck out before answer under an order of course, but if any of the defendants have answered there must be a special application for leave to do so, as the defendants' security for costs is thereby lessened, *Fellowes v. Deere*, 3 Beav. 353.

If one of several defendants has put in his answer, the plaintiff cannot have more than one order of course to amend, *Duncombe v. Lewis*, 10 Beav. 278; *Bainbrigge v. Baddeley*, 12 Beav. 152; *Winthrop v. Murray*, 7 Hare, 150.

Adding a defendant is an amendment within this order, and any further order can be obtained only upon special application, *Attorney-General v. Nethercoat*, 2 M. & C. 604. Amendment by order of course, after special order to amend irregular, *Edge v. Duke*, 10 Beav. 184. The irregular amendment of a bill is not a ground for taking it off the file, if it can be restored to its original state, *Attorney-General v. Cooper*, 3 M. & C. 258.

The expression "the last of several answers," means the last of the several answers filed by several defendants, *Dalton v. Hayter*, 7 Beav. 586; *Lester v. Archdale*, 9 Beav. 156; and not the last answer filed at the time of applying for the order, *Arnold v. Arnold*, 9 Beav. 206; *Collett v. Preston*, 3 Mac. & G. 432.

An order to amend obtained, but not served, is no answer to a motion to dismiss, *Jones v. Lord Charlemont*, 12 Jur. 389; but an order to amend obtained and served after a defendant had given notice of motion to dismiss, held an answer to the motion, but plaintiff to pay the costs of the motion, *Peacock v. Sievier*, 5 Sim. 553; *Waller v. Pedlington*, 4 Beav. 124.

An enlargement of the time, for taking out an order to amend may be given, but solicitor's misconduct or inadvertence not a ground for allowing further time, *Clarke v. Mayor of Derby*, 10 Jur. 978; see *Bowen v. Turner*, 1 Cham. R. 268.

If an order be made at the hearing for the cause to stand over with liberty to amend by adding proper parties, and apt words to charge them, or to show that other persons are not necessary, the plaintiff cannot introduce any charge against the original defendants which is not necessary to explain the amendments, *Gibson v. Ingo*, 5 Hare, 156; *Chisholm v. Sheldon*, 1 Grant, 294. And he is not allowed, in addition to adding parties or co-plaintiffs, to introduce new statements and charges in the bill relating to such co-plaintiffs, *Hickens v. Congress*, 1 Sim. 500; *Milligan v. Mitchell*, 1 M. & C. 438.

If the bill be amended by adding parties, after witnesses have been examined, the depositions of such witnesses cannot be read against the new parties, *Pratt v. Barber*, 1 Sim. 1.

A motion for an injunction held abandoned by amending the bill pending the motion, *Gouthwaite v. Rippon*, 1 Beav. 54; *Monypenny v. Dering*, 1 W. R. 99; *Macdonell v. Street*, 13 Grant, 168; and see *Davy v. Davy*, 2 Cham. R. 81; where a motion for leave to amend without prejudice to a pending motion for an injunction was refused, the amendments being material.

And where a motion for injunction stood over, and before it was again brought on the plaintiff amended the bill by adding parties necessary to the suit for the purpose of obtaining the relief sought, and in the absence of whom the relief would not have been granted, and again brought on the motion without giving a fresh notice, the Court, on the objection being taken, refused to hear the motion, *Westacott v. Cockerline*, 18 Grant, 159.

An order to amend without prejudice to an injunction already obtained, may be obtained on precept when the plaintiff is otherwise entitled to an order of course to amend, *Evans v. Root*, 1 Cham. R. 357; but see *Attorney-General v. Marsh*, 16 Sim. 572.

82. A plaintiff may move *ex parte* for leave to amend the bill, without prejudice to an order to take the bill *pro confesso* or to the entry of a note that the defendant is in default for want of an answer; and where the Court is satisfied that the rights of the defendant will not be prejudiced by such order, it may direct the same accordingly. (3rd June, 1853; Ord. 13, s. 8.)

Unless leave to amend is asked for and obtained under this section, the order *pro confesso* is discharged by the amendment, even though it is only to correct a clerical error, *Weightman v. Powell*, 12 Jur. 958; and see *Thrasher v. Connolly*, 1 Grant, 422.

Where the plaintiff had obtained an order *pro confesso* against one of the defendants, and afterwards applied to amend by adding parties without prejudice, the motion was refused, *Herchmer v. Benson*, 1 Grant, 92.

Where an order to amend was taken out, but through inadvertence, not without prejudice to an order *pro confesso* previously obtained, the Court thinking the case a proper one in which to have granted the order to amend without prejudice in the first instance, granted the order *nunc pro tunc*, so as to revive the order *pro confesso*, *Ruttan v. Smith*, 1 Cham. R. 296.

83. A plaintiff having obtained an order to amend his bill, is to amend within fourteen days from the date of the order; otherwise the order to amend becomes void,

and the case as to dismissal stands in the same situation as if the order had not been made. (3rd June, 1853; Ord. 9, s. 13.)

This section applies to an amendment effected by special leave, *Cridland v. Lord De Mauley*, 2 DeG. & S. 580; and includes cases where liberty is given to amend upon the allowance of a demurrer, *Bainbridge v. Baddeley*, 12 Beav. 152; *Armstead v. Durham*, 11 Beav. 422.

The plaintiff having submitted to a demurrer, obtained an order to amend, but did not do so within the time limited; he then obtained a second order of course to amend, and no answer being filed, a motion to discharge the second order was refused, *Nicholson v. Peile*, 2 Beav. 497.

An order to amend avoids an order *pro confesso* previously obtained, unless on an *ex parte* application, the Court gives leave to amend without prejudice to the order *pro confesso*. Ord. 82; and it has this effect even if the amendment be to correct a clerical error, *Weightman v. Powell*, 12 Jur. 958.

After an injunction had been obtained by a sole plaintiff, and the bill amended by adding a co-plaintiff, it was held that the injunction was gone by the amendment, *Attorney-General v. Marsh*, 16 Sim. 572; and making an amendment pending a motion for an injunction, is an abandonment of the motion, *Monypenny v. Dering*, 1 W. R. 99; *Gouthwaite v. Rippon*, 1 Beav. 54.

84. Where the case for relief made by a bill is a case of actual fraud, and the evidence, though failing to establish the fraud charged, yet shews some other ground on which the plaintiff is entitled to relief, the Court is, at the hearing, to have the same discretion as in other cases to allow an amendment, and to grant relief according to the truth of the case. (20th Dec., 1865; Ord. 17.)

85. No bill is to be filed for discovery merely, except in aid of the prosecution or defence of an action at law. (3rd June, 1853; Ord. 9, s. 19.)

VII. SERVICE OF BILLS.

86. In lieu of serving a defendant with a subpoena to appear and answer, an office copy of the bill of complaint is to be served upon him, with an endorsement thereon

in the form, or to the effect set forth in schedule C hereunder written. (3rd June, 1853; Ord. 9, s. 3.)

87. Service upon a defendant of an office copy of the bill of complaint is to be effected in the same manner, and shall have the same effect as the service of a writ of subpœna to appear and answer under the former practice; but it shall not be necessary to produce the original bill. (3rd June, 1843; Ord. 9. ss. 2 & 4.)

It is not essential that the service should be personal, but it may be effected by leaving the office copy with a grown up person at the defendant's place of abode. The person so served must be an inmate of the house, *Edgson v. Edgson*, 3 DeG. & S. 629; *Elliott v. Beard*, 2 Cham. R. 80.

If the service is not personal, the plaintiff cannot, in default of an answer, take the bill *pro confesso* as of course, but must serve the defendant personally with a notice of motion for such an order, Ord. 107.

A solicitor may accept service on behalf of the defendant, and in that case it is not necessary to serve the defendant personally with a notice of motion for an order to take the bill *pro confesso*, but the usual two days notice must be served upon the solicitor, *Ross v. Hayes*, 6 Grant, 277; but where the solicitor gave an undertaking to put in an answer, or in default that the plaintiff might proceed to take the bill *pro confesso* without further notice being given, the order was made on an *ex parte* application. *Peterborough v. Conger*, 1 Cham. R. 18. No order is now necessary, the acceptance of service and undertaking to answer by a solicitor being equivalent to personal service, Ord. 47; so a note may be entered under Order 104.

For the mode of effecting service upon corporations, see *Ords.* 91 & 92,

Where the subpœna was enclosed in a letter which the defendant admitted he had received, it was held insufficient, *Gathercole v. Wilkinson*, 1 DeG. & Sm. 681; but service of a copy of the bill was held sufficient where the defendant admitted he received it by post, *Burton v. Shaw*, 10 L. T. N. S. 292; and see *Keachie v. Buchanan*, 2 Cham. R. 42.

Service on the husband is good service on the wife, *Holcombe v. Trotter*, 9 Jur. 637; *Gee v. Cottle*, 3 M. & C. 180; *Steele v. Plomer*, 1 Mac. & G. 92; *Bunn v. Barclay*, 1 Cham. R. 254.

The Court has refused to grant leave to substitute service on the medical officer of an asylum, where a lunatic defendant is confined, *Morgan v. Jones*, 4 W. R. 381; but see *Re Paton*, 1 Cham. R. 193, where personal service on the lunatic of the petition to have him declared a lunatic was dispensed with, he being suicidal.

Service on the Deputy Governor of a gaol where the defendant is a prisoner is good service, *Newenham v. Pemberton*, 2 Coll. 54; service on one of two partners is not good service on the other, *Young v. Goodson*, 2 Russ. 255.

88. A defendant who has been served with an office copy of a bill of complaint within the jurisdiction of the Court, is to answer or demur to an original bill, or bill amended before answer, within one month after the service of the office copy of the original or amended bill, as the case may be. (3rd June, 1853; Ord. 12, s. 2.)

The word "month" means lunar month. *See note 1862.*

An application for further time to answer is not of course, but must be supported by affidavit, *Brown v. Lee*, 11 Beav. 162; and see *Byng v. Clark*, 13 Beav. 92; *York & Midland Railway Co. v. Hudson*, 13 Beav. 69.

On an application for leave to answer after the bill has been taken *pro confesso*, the proposed answer must be produced duly sworn, *Merrill v. Ellis*, 1 Cham. R. 268; *London v. London*, 2 Cham. R. 40.

After service of a bill on a defendant, the plaintiff cannot dismiss his bill on precipe without costs, even though no answer has been filed, *Coote v. Macbeth*, 1 Cham. R. 200.

89. Where a plaintiff amends his bill after answer, a defendant desiring to answer the same is to put in his answer thereto within seven days after service of the bill as amended. (3rd June, 1853; Ord. 12, s. 2.)

90. The time within which a defendant served out of the jurisdiction of the Court with an office copy of a bill of complaint shall be required to answer the same, or demur thereto, is as follows:

1. If the defendant is served in the United States of America, in any city, town, or village within ten miles from Lake Huron, the River St. Clair, Lake St. Clair, the River Detroit, Lake Erie, the River Niagara, Lake Ontario, or the River St. Lawrence, or in any part of Lower Canada not below Quebec, he is to answer or demur within six weeks after such service.

2. If served within any State of the United States of America not within the limits above described, other than Florida, Texas, or California, he is to answer or demur within eight weeks after such service.
3. If served within any part of Lower Canada below Quebec, or in Nova Scotia, New Brunswick, or Prince Edward Island, he is to answer or demur within eight weeks after such service.
4. If served within any part of the United Kingdom, or of the Island of Newfoundland, he is to answer or demur within ten weeks after such service.
5. If served elsewhere than within the limits above designated, he is to answer or demur within six calendar months after such service. (10th Jan., 1863; Ord. 7.)

Where there was an inconsistency between the endorsement of the bill and the order allowing foreign service, the Court refused to grant an order *pro confesso*, *James v. Wertheimer*, 5 U. C. L. J. 163.

91. Service of a bill of complaint within the jurisdiction of the Court upon a corporation aggregate, is to be effected by personal service of an office copy thereof on the warden, reeve, mayor or clerk, in case of a municipal corporation, or on the president, manager or other head officer, or the cashier, treasurer, or secretary, at the head office, or at any branch or agency in Ontario, or on any other person discharging the like duties, in the case of any other corporation.

The order permitting the service of the bill upon the agent of a corporation aggregate does not authorize service upon agents of corporations within Upper Canada, *Campbell v. Taylor*, 1 Cham. R. 2; if the head office of the corporation is situated within Upper Canada service must be effected there; if without, at any agency, *Howland v. Grierson*, 5 U. C. L. J. 19.

92. Where a foreign corporation aggregate, defendant to a bill of complaint, has no branch or agency in Ontario, service of the bill upon such corporation may be effected, out of the jurisdiction by personal service of an office copy thereof on the warden, reeve, mayor, clerk, president, manager, or other head officer, or on the cashier, treasurer, or secretary of such corporation, or other person discharging the like duties, as in the case of service in Ontario.

93. The service of a bill within the jurisdiction of the Court is to be of no validity if not made within twelve weeks after the filing of the bill. (6th Feb., 1865; Ord. 5.)

The Court will not grant an order extending the time for service; the plaintiff must use due diligence to effect service, and after it is effected, come to the Court to get it allowed, *Munn v. Glass*, 1 Cham. R. 337.

Where a bill had been filed, and a certificate of *lis pendens* registered, but no office copy served within the twelve weeks, the bill was dismissed with costs, *Somerville v. Kerr*, 2 Cham. R. 154.

94. The service of an amended bill within the jurisdiction of the Court, upon a party added by amendment, is to be of no validity if not made within twelve weeks after the amendment. (6th Feb., 1865; Ord. 5.)

95. The service of a bill without the jurisdiction of the Court is to be of no validity, if not made within a period consisting of twelve weeks, and an additional time equal to that limited by Order 90 for the answer of a defendant, computed from the filing of the bill as to a party made defendant by the original bill, and from the amendment of the bill as to a party added by amendment.

96. Service may be allowed when made after the periods above limited, upon its being made to appear to the satisfaction of the Court that due diligence has been used in effecting service. (6th Feb., 1865; Ord. 5.)

Service will be allowed where the delay is shown to have been accidental, *Bell v. Hastings*, 7 Beav. 592; but not where the delay is unexplained, *Horry v. Calder*, 7 Beav. 585; and see *Tugwell v. Hooper*, 10 Beav. 19.

97. In case the application for the allowance of the service is made within four weeks after the service, the order need not be served, but the defendant is to have four weeks to answer beyond the time allowed by the foregoing Orders. (20 Dec., 1865; Ord. 3.)

98. In case the application is not made within four weeks after service of the bill, the order for the allowance of the service may be made on such terms as the Court sees fit. (20th Dec., 1865; Ord. 4.)

99. Orders for substitutional service of an office-copy of a bill of complaint may be obtained in the same manner, and in the same cases, as orders for substitutional service of a subpoena to appear and answer might have been obtained under the former practice. (3rd June, 1853; Ord. 9, s. 6.)

The principle on which orders for substitutional service are granted is, that there is a reasonable ground to believe that the service will come to the party's own knowledge; *Hope v. Hope*, 19 Beav. 237; 4 D. M. & G., 328; *Hunt v. Lever*, 5 Ves. 147; *Heald v. Hay*, 9 W. R. 369; *Dicker v. Clarke*, 11 W. R. 635. Thus, when a bill is filed to stay an action at law, and the plaintiff at law is out of the jurisdiction, the plaintiff in equity is entitled to an order for service on the attorney in the action at law, *Sergison v. Beavan*, 22 L. J. Ch. 287; *Hammond v. Walker*, 3 Jur. N. S. 686; *Hurst v. Hurst*, 1 DeG. & Sm. 694; *Howkins v. Bennett*, 1 Gif. 215; and to obtain such an order an affidavit of merits, or verifying the allegations in the bill, is not now necessary, *Smith's Ch. Pr.* 366.

Substituted service may be allowed, though the defendant is not absconding, but is residing permanently abroad, *Griffiths v. Cowper*, 2 D. F. & J. 208.

The application should be made *ex parte*, *Danford v. Cameron*, 8 Ha. 329; and a plaintiff moving upon notice may be ordered to pay costs, *Reed v. Barton*, 28 L. T. 36; 4 W. R. 793; and it should be shown that every effort has been made to effect personal service, *Hope v. Carnegie*, 1 L. R. Eq. 126; *Frith v. Bush*, 11 W. R. 611; substitutional service will

not be allowed under the 28th Vic. c. 17, s. 12, unless it is shown that it would be very difficult and expensive to effect a service, *Pearson v. Campbell*, 2 Oham. R. 25.

Where a defendant was out of the jurisdiction, but had himself commenced a suit in respect of the same property, to which the plaintiff was not a party, the Court gave the plaintiff leave to substitute service on the solicitor who was acting for the defendant in his own suit, *Howkins v. Bennet*, 6 Jur. N. S. 948; but the solicitor in a former suit is not the client's agent for the purpose of substituted service in a fresh suit, though relating to the same matter, *Hurst v. Hurst*, 1 DeG. & Sm. 694; nor in a cross suit, *Waterton v. Croft*, 5 Sim. 502.

Service of proceedings in a supplemental suit may be substituted on the defendant's solicitor in the original suit, *Scott v. Wheeler*, 13 Beav. 289; *Norton v. Hepworth*, 1 Mac. & G. 84; and substitutional service on the solicitor was ordered, though he objected to accept it, *Governors of Grey Coat Hospital v. Westminster &c., Commissioners*, 4 Jur. N. S. 449.

It must be shewn that the person on whom service is to be effected is the agent for the particular purposes of the suit, *Bones v. Angier*, 18 Jur. 1050; or at any rate for a purpose closely connected with the suit, *Pasmore v. Nicholls*, 1 Grant, 130; *Cupples v. Yorton*, 2 Oham. R. 81; *Allan v. Pyper*, 5 U. C. L. J. 118; his admission that he is agent is not sufficient, the fact must be proved, *Legge v. Winstanley*, 3 Grant, 106.

A solicitor who had merely written for a copy of the bill was held not sufficiently an agent for the purpose, *Asiatic Banking Co. v. Anderson*, 13 L. T. N. S. 272; nor is the fact of a person being in communication with the absent party sufficient, *Watts v. Hughes*, 8 W. R. 292.

It is not necessary to take out a new order for substitutional service on an agent whenever the bill is amended, *Rainey v. Dickson*, 5 U. C. L. J. 163.

An order obtained under this section does not authorise service on the agent of a notice of motion to take the bill *pro confesso*, as he may in the meantime have ceased to be agent, and a further order must be got; but in a proper case an order may be obtained allowing substituted service not merely of the bill, but of all future proceedings, *Christie v. Cameron*, 8 W. R. 146; *Foster v. Menzies*, 16 Beav. 568.

The order allowing substitutional service, should be shewn to the person served, *Jones v. Brandon*, 2 Jur. N. S. 437.

As to substituted service upon a company whose office is closed, see *Re Unity &c., Association*, 11 W. R. 355; *Re Petroleum Co.*, 15 W. R. 29; *Gaskell v. Chambers*, 26 Beav. 252.

Substituted service was held good, though no order had been previously obtained, *Re Paragon & Spero Mining Co.*, 10 W. R. 76; *Pycroft v. Williams*, 5 W. R. 464; but see *Re Boger*, 8 Jur. N. S. 930.

100. In case it appears to the Court by sufficient evidence that a defendant is absent, or cannot be found after due diligence to be served with an office-copy of the bill of complaint, the Court may order the defendant to answer or demur within a time to be named in the order, and may direct a copy of the order, together with a notice to the effect set forth in schedule C hereunder written, to be published in such manner as the Court thinks fit; and in case the defendant does not answer or demur within the time limited by such order, the Court may order the bill to be taken *pro confesso* in the manner hereafter provided. (3rd June, 1858; Ord. 9, s. 8.)

It is not enough to state on affidavit that the defendant cannot, after due diligence, be found to be served, but the exertions made to find him must be detailed, that the Court may judge whether due diligence has been used, and whether he is absconding or not, *Murney v. Knapp*, 1 Cham. R. 26; but it is not necessary to shew that he has absconded to avoid service in the particular suit, *Barton v. Whitcomb*, 16 Beav. 205.

When a defendant who cannot be found has any relatives in the country, they should be examined before a special examiner or deputy master, as to their knowledge of his residence, *Perkins v. Plebs*, 1 Cham. R. 307; *McMurrich v. Hogan*, *Ibid*; and see *Irving v. Strait*, 1 Cham. R. 165.

The Court in some cases orders an office copy of the bill to be served upon one of the defendant's relatives, in addition to the publication of an advertisement.

The order usually directs the advertisement to be published once in each week for the four weeks preceding the day appointed for defendant to answer. In such an order the word "week" means any period of seven consecutive days, and not the particular seven commencing with Sunday. Where the last insertion of the advertisement was on a Tuesday, and the day appointed for answering was the Thursday week following, this was held not to be a sufficient compliance with the order, *Buzalgette v. Lowe*, 24 L. J. Ch. 368.

In moving to take a bill *pro confesso* against a defendant who has been advertised, it is necessary to shew by affidavit that he cannot be found to be served with notice of the motion, *Gilmour v. Matthew*, 3 Grant, 376; *McCarty v. Wessels*, 1 Cham. R. 5. And to produce and shew to the Judge the papers in which the advertisement has been inserted, *Goodfellow v. Hambly*, 1 Cham. R. 62.

Where the sole defendant in a foreclosure suit had been absent from the jurisdiction for fourteen years, and had not been heard of during that time, a motion for the service of the bill upon him by publication was refused, *Shaw v. Acker*, 1 Cham. R. 395; *Kelly v. Macklem*, 1 Cham. R. 396, n.

101. Where the defendant is out of the jurisdiction of the Court, then upon application supported by such evidence as may satisfy the Court in what place or country such defendant is or may probably be found, the Court, instead of directing publication as provided for by Order 100, may order that an office-copy of the bill be served on the defendant in such place or country, or within such limits, as the Court thinks fit to direct; and the order is in such case to limit a time (depending on the place of service) within which the defendant is to answer or demur, or obtain from the Court further time to make his defence. (3rd June, 1853; Ord. 9, s. 5.)

The application for such an order is made in Chambers *ex parte*, and must be supported by affidavits shewing where the defendant resides. The affidavit should be made by some person who knows that the person proposed to be served is the defendant, that he is residing at the place alleged, from having recently seen him there, or received letters from him dated at, and bearing the postmark of the place, and which shew that he is resident there. If the defendant's residence be proved by letters it must be shewn when the last communication was received from him, *Ferry v. Davis*, 1 Cham. R. 7; and if the affidavit merely states that letters have been received from the defendant dated at a particular place, and does not shew that he resides there, the order will be refused, *Kingston v. Monger*, 1 Cham. R. 18.

It is usual to name in the order a particular place where service is to be effected, but this is not necessary, as the Court may order service not merely in a particular place, but within certain limits; as within the Grand Duchy of Baden, *Preston v. Dickenson*, 9 Jur. 919; and see *Blenkinsopp v. Blenkinsopp*, 8 Beav. 612; *Whitmore v. Ryan*, 4 Hare, 612.

In fixing the time, the Court has regard to the facilities for communicating with the place where service is to be effected.

A copy of the order must be served along with the document, service of which is thereby authorized; and the person served must be identified with the defendant either by the affidavit of service or by a separate affidavit.

The Court is very strict in the proof of identity required. A statement that the deponent served "the above named defendant," or that the person served admitted himself to be the defendant, is insufficient; there must be clear and distinct proof of identity, and the deponent's means of knowing the fact must appear by the affidavit.

102. The Court may provide for or order service in any other manner that the Court under the circumstances of the case deems conducive to the ends of justice.

The 26th Vic. c. 17, s. 12, gives the Court larger powers as to proceeding against absent defendants whose residence is unknown, and the Court will grant orders for substitutional service in cases where it would not under the practice before the Act, dispensing with advertising where it would be useless, *Cooper v. Lans.* 1 Cham. R. 363.

103. Affidavits of the service of an office-copy of a bill of complaint are to be in the form or to the effect set forth in schedule D hereunder written; they are to state where, when, and how such service was effected; but no copy of the bill is to be annexed. (3rd June, 1853; Ord. 9, s. 4.)

VIII.—TAKING BILLS *PRO CONFESSO*.

104. Where a defendant, not appearing to be an infant, or a person of weak or unsound mind, unable of himself to defend the suit, has been personally served within the jurisdiction of the Court, with an office-copy of a bill of complaint, and has neglected to answer or demur within one month from the time of such service, no order is to issue for taking the bill *pro confesso*; but in lieu thereof the plaintiff is, after the expiration of one month and within six months, to file the usual affidavit of service of the bill, and a precipe requiring the Clerk of Records and Writs, or the Deputy Registrar, to note that the defendant is in default for want of answer, and that the bill is to be taken *pro confesso* against him. ✓ (3rd June, 1853; Ord. 13, s. 1; 6th Feb. 1865; Ord. 19.)

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An acceptance of service and undertaking to answer by a solicitor is equivalent to personal service, *Ord.* 47.

Where more than six months have elapsed since service was effected, notice of motion for an order *pro confesso* must be served, *Brown v. Baker*, 1 Cham. R. 7. But where the defendant lived out of the jurisdiction the order was granted *ex parte*, *Kerr v. Clemow*, 1 Cham. R. 14; and where the defendant had absconded, *Hare v. Smart*, 1 Cham. R. 350; so also an order was granted *ex parte* though more than six months had elapsed, the long vacation having intervened, *Grange v. Conroy*, 1 Cham. R. 70.

The usual two-day notice of motion is sufficient, *Howard v. Watson*, 1 Cham. R. 203.

105. If the defendant is in default for want of answer, the Clerk of Records and Writs, or the Deputy Registrar, is to enter a note in the registry of pleadings, as required by the precipe, in the same manner as pleadings are entered therein, and the entry is to have the same effect as an order for taking the bill *pro confesso*. (6th Feb. 1865; *Ord.* 19.)

Where the Attorney-General being a defendant neglected to appear, the Court under the old practice refused to make an order compelling him to do so, but took it as a *nihil dicit*, *Barclay v. Russell*, 2 Dick. 729. The modern practice appears to be, that where the Attorney-General is a defendant and does not answer, the plaintiff should obtain an order that he do answer within a week, or in default that the bill be taken *pro confesso*, against him, *Groom v. Attorney-General*, 9 Sim. 325; *Shea v. Fellowes*, 1 Cham. R. 30.

Before a bill can be taken *pro confesso* against a defendant a married woman, an order must be obtained for her to answer *separately* from her husband. This order may be obtained in Chambers on the *ex parte* application of the plaintiff, who must shew that the case is a proper one for such separate answer, *Wright v. Morrow*, 1 Cham. R. 286; but before the order will be granted it must be shewn that she is in default for want of answer, *Anon*, 1 Cham. R. 9; it is not necessary to serve her with the bill before obtaining an order for her to answer separately, service on the husband alone is sufficient, *Bunn v. Barclay*, 1 Cham. R. 254. The husband must be served before the wife will be ordered to answer separately, *Brandon v. Wheeler*, 1 Cham. R. 262. Where a solicitor had accepted service for the husband and wife, and had given a written consent that in the event of no answer being filed, the bill might be taken *pro confesso*; *held*, that this did not dispense with an order for the wife to answer separately, before proceeding to take the bill *pro confesso* as against

her, *Sargeant v. Sharpe*, 1 Oham. R. 63. The time within which she is to answer must be expressed in the order, *Miller v. Gordon*, 5 Grant, 134.

Where a defendant refused to attend before Commissioners appointed to take his evidence abroad, the usual order to set the cause down to be taken *pro confesso*, was made, *Prentiss v. Bunker*, 4 Grant, 147.

An order to amend even a clerical error renders an order *pro confesso* inoperative, *Weightman v. Powell*, 2 DeG. & S. 570; 12 Jur. 958.

106. Where a defendant not appearing to be an infant or a person of weak or unsound mind, unable of himself to defend the suit, has been personally served with an office-copy of a bill out of the jurisdiction, and has neglected to answer or demur within the time limited for that purpose, the plaintiff may apply to the Court *ex parte* for an order to take the bill *pro confesso* against such defendant; and the Court, on being satisfied by affidavit that an office-copy of the bill was served personally, and that no answer has been filed for such defendant, may, if it thinks fit, order the same accordingly. (3rd June, 1853; Ord. 13, s. 2.)

107. Where an office-copy of a bill of complaint has been duly served, but the service has not been personal, and the defendant has neglected to answer or demur within the time limited in that behalf, the plaintiff may cause the defendant to be served personally, or by his solicitor if he has one, with notice of a motion to be made on some day, not less than seven days after the date of such service, that the bill may be taken *pro confesso* against the defendant; and thereupon, unless the defendant has in the meantime put in his answer, the Court, if it thinks fit, may order the bill to be taken *pro confesso*, either immediately, or at such time, and upon such terms, and subject to such conditions, as the Court, under the circumstances of the case, thinks proper. (3rd June, 1853; Ord. 13, s. 3.)

An acceptance of service and undertaking to answer by a solicitor is equivalent to personal service, Ord. 47.

Where a solicitor has accepted service of an office-copy bill for the defendant, a two days' notice of motion is sufficient, and the notice may be served upon the solicitor, *Ross v. Hayes*, 6 Grant, 277; and see *Shaw v. Liddell*, 4 Grant, 352.

Where after notice of motion is served, and before the motion day, the answer is filed, the plaintiff is entitled to his costs of the motion, *Anon*, 1 Grant, 423.

108. Where an office-copy of a bill of complaint has been duly served, but the service has not been personal, and the defendant has neglected to answer or demur within the time limited in that behalf, then in case the office-copy of the bill has been served upon the defendant out of the jurisdiction, or the plaintiff has been unable with due diligence to serve him personally with such notice of motion as is provided by Order 107, the Court, upon the *ex parte* application of the plaintiff, may direct a notice of motion in the form or to the effect set forth in schedule E hereunder written, to be published in such manner as the Court thinks fit; and upon the hearing of the motion the Court, being satisfied of the due publication of the notice, and that no answer has been filed, may order the bill to be taken *pro confesso*, either immediately, or at such time, and upon such conditions, as the Court, under the circumstances of the case, thinks proper. (3rd June, 1853; Ord. 13, s. 4.)

To obtain leave to publish such an advertisement, the same kind of evidence must be given as is required to obtain an order for advertising an absent or absconding defendant, under Order 100.

On moving for the order *pro confesso*, the papers in which the advertisement was inserted must be produced to the Judge, before the order will be granted, *Goodfellow v. Hambly*, 1 Oham. R. 62.

It is a fatal omission in the advertisement on which an application to take the bill *pro confesso* is based, if the name of the particular defendant against whom the application is directed be omitted, *Jones v. Brandon*, 2 Jur. N. S. 487.

109. Where the plaintiff has proceeded under Orders 100, 101, or 102, and the defendant has neglected to an-

answer or demur within the time limited, the plaintiff may apply to the Court, *ex parte*, for an order to take the bill *pro confesso* against the defendant; and the Court, on being satisfied of the due publication of the order and notice in that behalf prescribed, or that service has been effected in the prescribed manner, may direct the bill to be taken *pro confesso* against the defendant, if it thinks fit, either immediately or at such time, and upon such terms, and subject to such conditions, as the Court, under the circumstances of the case, thinks proper. (3rd June, 1853; Ord. 13, s. 6.)

Upon the application under this section, the Judge must be satisfied that the advertisement has been published in strict conformity with the requirements of the order authorizing such publication, and that no answer has been filed, the newspapers containing the advertisement must be produced, *Goodfellow v. Hambly*, 1 Cham. R. 62; and it is necessary to shew that the defendant cannot be found to serve him with notice of motion, *Gilmour v. Matthew*, 4 Grant, 376; *McCarty v. Wessels*, 1 Cham. R. 5.

110. Where a corporation aggregate, served with an office-copy of a bill of complaint, has neglected to answer or demur within the time limited in that behalf, the plaintiff may apply to the Court *ex parte* for an order to take the bill *pro confesso* against the corporation, and the Court, on being satisfied of the due service of the bill, and that no answer has been filed for the corporation, may, if it thinks fit, order the same accordingly.

111. An order to take a bill *pro confesso* against a defendant does not require to be served; and all further proceedings in the case may be *ex parte* as to such defendant, unless the Court orders otherwise. (3rd June, 1853; Ord. 13, s. 7.)

Where six years had elapsed after the order *pro confesso* was obtained and no proceedings had been taken since, leave was given to the plaintiff to set the cause down for hearing, giving the defendant notice forthwith of the proceedings, *Cryne v. Doyle*, 1 Cham. R. 1.

Where after a bill has been taken *pro confesso*, but before any decree is drawn up, the defendant intervenes and is a party to proceedings between the plaintiff and defendant, that is not such a case as is contemplated by the above section where all proceedings in the cause may be taken *ex parte*, *Strachan v. Murney*, 6 Grant, 284.

112. A defendant against whom an order to take a bill *pro confesso* has been made, is at liberty to appear at the hearing of the cause; and if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the bill. (3rd June, 1853; Ord. 14, s. 2.) (*Eng. Con. Ord. 22, r. 7.*)

A defendant appearing under this section must waive all objections, *Greaves v. Greaves*, 12 Beav. 422; but he may shew that the bill is open to demurrer for want of equity, *Greig v. Green*, 6 Grant, 240; 3 U. C. L. J. 218. Even though the defendant does not appear, the bill will be dismissed, if the plaintiff appears to have no equity, *Speidall v. Jervis*, 2 Dick. 632; and the Court will not hear any affidavits against the bill as confessed; the order *pro confesso* must first be set aside, *Manley v. Williams*, 5 U. C. L. J. 163.

113. Upon the hearing of a cause in which a bill has been ordered to be taken *pro confesso*, such a decree is to be made as the Court thinks just; and the decree so made is to be absolute in the following cases, viz.:

1. Where an office-copy of the bill has been served personally, or where service has been accepted by a solicitor under Order 47.
2. Where notice of a motion to take the bill *pro confesso* has been served under Order 107.
3. Where the defendant has appeared at the hearing, and waived all objection to the order to take the bill *pro confesso*. (3rd June, 1853; Ord. 14, s. 3.)

The plaintiff to obtain a decree must establish his right to the relief sought, *Lloyd v. Lloyd*, 4 Dr. & War. 354; *Stanley v. Bond*, 6 Beav. 420; *Brierly v. Ward*, 15 Jur. 277; plaintiff cannot take such a decree as he

can abide by, but such as shall be just, *Collins v. Collyer*, 3 Beav. 600; *Haynes v. Ball*, 4 Beav. 101; and where the defendant made default, but the plaintiff appeared to have no equity, the bill was dismissed, *Speidall v. Jarvis*, 2 Dick. 682.

In a suit to enforce a security and take accounts, the Court refused to shorten the period of three years, after which, under Order 116, the decree could be made absolute, though the plaintiff contended that the delay would amount to a denial of justice, *Darlow v. Simcock*, 14 W. R. 664; but where the bill was ordered to be taken *pro confesso* against a bare trustee, the decree was made absolute in the first instance, *Leite v. Vicini*, 12 W. R. 897.

114. After a decree founded on a bill taken *pro confesso* has been passed and entered, if the decree is not absolute under Order 113, an office-copy thereof may be served on the defendant against whom the order to take the bill *pro confesso* was made, or his solicitor, together with a notice, to the effect that if the defendant desires permission to answer the plaintiff's bill and set aside the decree application for that purpose must be made to the Court within the time specified in the notice, or the defendant will be absolutely excluded from making such application. (3rd June, 1853; Ord. 14, s. 5.) (*Eng. Con. Ord.* 22, r. 11.)

The Court may dispense with service of decrees, under special circumstances, *Kemp v. Latter*, 18 Jur. 770; *Thurgood v. Kane*, 32 Beav. 156; *Leite v. Vicini*, 12 W. R. 897; *Bonbow v. Davies*, 12 Beav. 421.

The mere fact that service will be difficult or expensive will not induce the Court to dispense with the service, *Vaughan v. Rogers*, 11 Beav. 165; and see *Brierly v. Ward*, 20 L. J. Ch. 46.

An accounting defendant should be served not only with the decree which directed the accounts, but with the warrants to proceed with the accounts under the decree, *Golden v. Newton*, Johns. 720; *King v. Bryant*, 3 M. & C. 191.

The application to dispense with service ought not to be made till the three years mentioned in Order 116 have elapsed, *James v. Rice*, 5 D. M. & G. 461.

Service on a defendant out of the jurisdiction, of the order limiting the time within which he may apply to set aside the decree is a sufficient notice under this rule, *Trilly v. Keefe*, 16 Beav. 83; 16 Jur. 442.

See 649

115. If the notice is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the defendant, is to be three weeks after service of the notice; and if the notice is to be served out of the jurisdiction, the time is to be specially appointed by the Court upon the *ex parte* application of the plaintiff. (3rd June, 1853; Ord. 14, s. 5.) (*Eng. Con. Ord. 22, r. 12.*)

See 649

116. Where a decree is not absolute under Order 113, the Court may order the same to be made absolute, on the motion of the plaintiff:

1. After the expiration of three weeks from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction.
2. After the expiration of the time limited by the notice provided by Order 115.
3. After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof: and the order may be made either on the first hearing of the motion, or on the expiration of any further time which the Court may allow to the defendant for presenting a petition for leave to answer the bill. (3rd June, 1853; Ord. 14, s. 6.) (*Eng. Con. Ord. 22, r. 15.*)

See 649

Dispensing with service does not count as service so as to bring a case within the first clause of this Order, *Darlow v. Simcock*, 14 W. R. 664.

Service of an order limiting the time within which defendant might apply to set aside a decree *pro confesso*, held sufficient notice for the purpose of making the decree absolute, *Trilly v. Keefe*, 16 Beav. 83: 16 Jur. 442. If the plaintiff cannot serve the defendant, he must, at the end of three years, when he applies to make the decree absolute, explain why it has not been served; a previous application to dispense with service is premature, *James v. Rice*, 5 D. M. & G. 461.

The Court cannot dispense with service till the expiration of the three years, *Vaughan v. Rogers*, 11 Beav. 165.

See Order 117. Where the decree is not absolute under Order 113, and has not been made absolute under Order 116, and the defendant has a case upon the merits not appearing in the bill, he may apply to the Court by petition, stating such case, and submitting to such terms with respect to costs and otherwise as the Court may think reasonable, for leave to answer the bill; and the Court, on being satisfied that the case is proper to be submitted to the judgment of the Court, may, if it thinks fit, and upon such terms as may seem just, vacate the enrolment (if any) of the decree, and permit the defendant to answer the bill: and if permission is given to the defendant to answer the bill, leave may be given to file a separate replication to such answer, and issue may be joined, and witnesses examined, and such proceedings had, as if the decree had not been made, and no proceedings against such defendant had been had in the cause. (3rd June, 1853; Ord. 14. s 7.) (*Eng. Con. Ord. 22, r. 16.*)

Permission given under this rule in a foreclosure suit, on terms of paying plaintiff's costs of the application, and of the suit, *Inglis v. Campbell*, 2 W. R. 396.

118. In pronouncing the decree, the Court, either upon the case stated in the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case requires, may order a receiver of the real and personal estate of the defendant against whom the bill has been ordered to be taken *pro confesso* to be appointed, with the usual directions; or may direct a sequestration of such real and personal estate to be issued; and may, if it appears to be just, direct payment to be made out of such real and personal estate of such sum or sums of money as at the hearing or any subsequent step in the cause the plaintiff seems to be entitled to; provided that, unless the

decree is absolute, such payment is not to be directed without security being given by the plaintiff for restitution, if the Court afterward should think fit to order restitution to be made. (3rd June, 1853; Ord. 14, s. 9.) (*Eng. Con. Ord. 22, r. 9.*)

The plaintiff's own bond held sufficient security for the restitution of property taken under a sequestration after bill taken *pro confesso*, *Lett v. Randall*, 7 Jur. 1075; for form of decree in such a case, see *Torr v. Torr*, Johns. 660.

119. The rights and liabilities of a plaintiff or defendant under a decree made upon a bill taken *pro confesso* extend to the representatives of a deceased plaintiff or defendant at the time when the decree was pronounced; and, with reference to the altered state of parties and any new interests acquired, the Court may, upon motion, served in such manner and supported by such evidence as under the circumstances of the case the Court deems sufficient, permit any party, or the representative of any party, to adopt such proceedings as the nature and circumstances of the case may require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree and the rights of the parties duly ascertained and determined. (3rd June, 1853; Ord. 14, s. 10.) (*Eng. Con. Ord. 22, r. 17.*)

IX.—DEMURRERS.

120. A defendant may demur to a bill of complaint at any time within one month after service upon him of an office-copy of the bill. (3rd June, 1853; Ord. 11.)

A demurrer is the proper mode of raising a defence, the grounds of which are apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it.

A demurrer will lie to a bill, though called a cross bill, if it is not really a cross bill, *Moss v. Anglo-Egyptian Navigation Co.*, 1 L. R. Ch 108. On a demurrer *ore tenus* it was held that every material allegation in a bill must be positive, *Yarrington v. Lyon*, 2 Cham. R. 22.

The Court will not, on demurrer, decide a doubtful question on an equitable title, notwithstanding the inclination of the Court is in favor of the defendant, *Cochrane v. Willis*, 10 Jur. N. S. 162; nor whether a suit can or cannot be taken as supplemental to a former suit, *Shrewsbury v. North Staffordshire Rail. Co.*, 9 Jur. N. S. 787; 11 W. R. 742.

Where a demurrer is filed for want of parties as well as for want of equity, the question of parties must be disposed of, before the demurrer for want of equity can be argued, *Malcolm v. Malcolm*, 2 Cham. R. 200.

Demurrer allowed to a bill filed by "The United States of America" as plaintiffs, on the ground that a foreign sovereign State is not entitled to sue in the Courts of Equity in this country without putting forward some public officer as representing their interests, upon whom process may be served, and who can be called upon to give discovery upon a cross bill, *United States v. Wagner*, 3 L. R. Eq. 724.

If a partial demurrer be allowed it generally imposes on the plaintiff the necessity of amending his bill; thus upon the allowance of a demurrer for want of parties, the Court allowed the plaintiff to amend by striking out that part of the bill which rendered such parties necessary, *Attorney-General v. Mayor &c. of Poole*, 4 M. & C. 17.

Where the Court sees that the frame of the bill is not such as entitles the plaintiff to relief against the demurring party, it will refuse leave to amend, *Tyler v. Bell*, 2 M. & C. 89.

If a demurrer be overruled the defendant cannot put in another without leave, *Bancroft v. Wardom*, 2 Bro. C. C. 66; but overruling demurrer to the original bill does not prevent the defendant demurring to an amended bill, *Bosanquet v. Marsham*, 4 Sim. 573; *Cresy v. Bevan*, 13 Sim. 354.

After a demurrer has been overruled the defendant must ask for time to answer, *Trim v. Baker*, 1 S. & S. 469; *Waterton v. Croft*, 6 Sim. 438; if no application for time is made when the demurrer is overruled, the defendant must put in his answer within the usual time, if it has not expired, or make a special application on notice for further time, 1 *Daniel's Pr.* 551. By answering the defendant waives his right to appeal against the order overruling the demurrer, *Simpson v. Smith*, 1 E. & A. Rep. 1.

Where a demurrer on two grounds succeeds as to one, and fails as to another, no costs are given on either side, *Benson v. Hadfield*, 5 Beav. 546; *Allen v. Houlden*, 6 Beav. 148; a demurrer having been held good on one ground, though overruled as to another, the defendant was allowed to answer without costs, *Paine v. Chapman*, 6 Grant, 338.

Where a demurrer for multifariousness was overruled, and a demurrer *ore tenus* for want of parties was allowed, the practice was held to be that the demurrer for multifariousness should be overruled with costs, and the demurrer *ore tenus* allowed without costs, *Kelly v. Ardell*, 11 Grant, 579.

Where a Judge has considered that the question raised by a bill ought not to be decided on demurrer, the Court of Appeal will not ordinarily overrule his decision, *Sheffield Water Works v. Yeomans*, 2 L. R. Ch. 8.

There is nothing in this order to prevent a demurrer being filed after the expiry of the month, any more than an answer if the bill has not been taken *pro confesso*; and a demurrer may be filed even after notice of a motion to take the bill *pro confesso* has been served, *White v. Baskerville*, 2 Cham. R. 40.

A defendant cannot obtain further time to demur; and where further time to answer has been given, a demurrer filed by the defendant will be taken off the files with costs, *Boulbee v. Cameron*, 2 Cham. R. 41; *Chamberlain v. McDonald*, 2 Cham. R. 204.

A demurrer is not put in upon oath, but otherwise is filed in the same manner as an answer; the name or firm, and place of business of the solicitor, by whom it is filed, must be endorsed, *Ord. 40*; and notice of filing should be served the same day, *Ord. 46*.

The omission of any formal part in a demurrer (such as the heading), is an irregularity, which entitles the plaintiff to have the demurrer taken off the files, but an amendment may be allowed, *Bennett v. O'Meara*, 2 Cham. R. 167.

A demurrer prevents the plaintiff from moving for an injunction, or to dismiss his bill until it is disposed of, but the pendency of a demurrer does not prevent the plaintiff from serving the defendant with a notice of motion, *Wardle v. Claxton*, 9 Sim. 412; in general the Court will not advance a demurrer, *Anon*, 1 Mad. 299; in cases however of bills for injunction, the Court will, upon application, where the matter is pressing, order the demurrer to be argued immediately, *Cousins v. Smith*, 13 Ves. 167; *Jones v. Taylor*, 2 Mad. 181.

The plaintiff cannot obtain an order to produce, pending the argument of a demurrer, *Reid v. Baldwin*, V. C. Esten, 22 Aug. 1861.

121. Where a demurrer is not set down for argument by the plaintiff, or the plaintiff does not obtain an order to amend, within eight days after notice of filing the demurrer is served, the defendant may set the same down, and serve notice thereof.

X.—ANSWERS.

122. Answers may be in a form similar to the form set out in schedule F to these Orders, and are to consist of a clear and concise statement of such defences as the

defendant desires to make. The signature of counsel is unnecessary; the answer is to be verified by the oath of the defendant; and the jurat may be in the form set forth in schedule F. (3rd June, 1853; Ord. 12, s. 1.)

As to the rule that a distinct denial in an answer of statements made in the bill, must be contradicted by two witnesses, or by one witness corroborated by attendant circumstances, see *Boulton v. Robinson*, 4 Grant 109.

As to admissions in answer, see *Ord. 124*.

Filing a replication waives all irregularities in an answer previously filed, but does not waive the plaintiff's right to move against it for scandal, *Ruttan v. Smith*, 1 Cham. R. 184.

The fact that an answer is sworn before a commissioner who had formerly been concerned as solicitor in the cause, is no ground for taking it off the files, *Gordon v. Johnson*, 2 Cham. R. 205; *Foster v. Harvey*, 11 W. R. 899.

123. The silence of the answer as to any statement of the bill is not to be construed into an implied admission of its truth; and any allegation introduced into an answer for the purpose of preventing such implied admission, is to be considered impertinent. (3rd June, 1853; Ord. 12, s. 1.)

124. A defendant is to admit in his answer such of the allegations contained in the plaintiff's bill as are to the knowledge of such defendant true, or as he can readily ascertain to be true, or as he has reason to believe and does believe to be true; and it shall be sufficient if such admissions are expressed to be only for the purposes of the suit in which the same are made. (6th Feb., 1865; Ord. 6.)

125. Admissions are, in all cases where it is practicable, to be by reference to the numbers of the paragraphs in the bill to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making such admissions; and it shall not be necessary or proper, in any answer, to allege ignorance

of any fact stated in the bill, or any other reason for not admitting any fact therein alleged. (6th Feb., 1865; Ord. 9.)

126. A defendant may claim, by answer, any relief against the plaintiff which such defendant might claim by a cross bill; and for this purpose the facts necessary to make out the defendant's right to relief are to be stated in the answer as part of the defendant's case, and he is to pray such relief as he may think himself entitled to. And the Court, in all such cases, may either grant such relief upon the answer, or it may direct or permit a separate suit to be instituted. (3rd June, 1853; Ord. 12, s. 4; 1st April, 1867; Ord. 3.)

127. The Court may permit a supplemental answer to be filed at any period of the suit, for the purpose of putting new matter in issue, in furtherance of justice, and upon such terms as may seem proper. (3rd June, 1853; Ord. 12, s. 5.)

When a defendant desires to correct, add to, or explain his answer after it is filed, he will not be permitted to amend it, but he must apply for liberty to file a supplemental answer, *Jennings v. Merton College*, 8 Ves. 79; *Phelps v. Prothero*, 2 DeG. & S. 274. For the purpose of getting such leave a notice of motion is served, returnable in Chambers, and supported by affidavit, *Wells v. Wood*, 10 Ves. 401; but see *Churton v. Frewen*, 1 L. R. Eq. 238, where it was held that an application for leave to file a supplemental answer to correct a mistake in the original answer, must be made by motion in Court, and not by summons in Chambers. The new facts intended to be introduced must be specified in the notice, *Haslar v. Hollis*, 2 Beav. 236; *Smith v. Hartley*, 5 Beav. 432.

Leave to file a supplemental answer has been given even after replication filed and the cause set down for examination, *Cherry v. Morton*, 1 Cham. R. 25; *Worts v. How*, 2 Cham. R. 111; and to correct a date even after the cause was in the paper for hearing, *Fulton v. Gilmour*, 1 Phill. 522.

Where new matter was discovered after the examination of witnesses and the hearing of a cause, leave was given to file a supplemental answer on terms, *McKinnon v. McDonald*, 2 Cham. R. 23; and leave was given after considerable delay, the plaintiff having allowed the suit to sleep for five years, *Worts v. How*, 2 Cham. R. 111.

The Court may now permit a defendant to introduce new matter of defence at the hearing by supplemental answer, under oath or otherwise, *Ord.* 129.

128. Leave to file a supplemental answer is to be applied for by motion. The notice of motion is to set forth the proposed answer, and state the grounds upon which the indulgence is asked; and it must be supported by such evidence as satisfies the Court of the propriety of permitting the supplemental answer to be filed, under all the circumstances, having reference to the subject matter of the answer, and to the stage of the cause in which the application is made. (3rd June, 1853; *Ord.* 12, s. 5.)

The defendant is required to account for the mistake, to state the terms on which it is intended the answer should be filed, and to verify the truth of the proposed answer, *Bell v. Dunmore*, 7 Beav. 283; *Fulton v. Gilmour*, 8 Beav. 154; and the plaintiff has a right to see a full copy of the answer proposed to be filed before it is filed, *Fulton v. Gilmour*, 9 Jur. 1.

A supplemental answer is permitted only with great caution, *Curling v. Marquis of Townshend*, 19 Ves. 628; especially if the fact to be added is prejudicial to the plaintiff, or if the cause is in such a state that the other party may be prejudiced, but if it be beneficial to the plaintiff, leave is readily granted, *Greenwood v. Atkinson*, 4 Sim. 54; *Percival v. Caney*, 14 Jur. 473.

A defendant has been permitted to file a supplemental answer to correct a mistake in the original answer as to a matter of fact, *Fulton v. Gilmore*, 1 Phill. 522; where at the time of swearing to his answer he was ignorant of a particular fact, *Tidswell v. Bowyer*, 7 Sim. 64; *Frankland v. Overend*, 9 Sim. 365; *Torrance v. Crooks*, 1 Grant's E. & A. R. 230; or where, by the mistaken advice of his solicitor, he did not state a particular fact which he wished to have stated, *Nail v. Punter*, 4 Sim. 474; *Cherry v. Morton*, 1 Cham. R. 25; *Worts v. How*, 2 Cham. R. 111. Leave to plead the Statute of Limitations by supplemental answer after issue, refused, *Percival v. Caney*, 14 Jur. 473; but leave has been given to file a supplemental answer for the purpose of pleading the Registry Act, *Graham v. Chalmers*, 23rd August, 1857.

The supplemental answer will be confined strictly to the mistake clearly sworn to, and probable in itself, *Strange v. Collins*, 2 V. & B. 163; leave will be refused unless a sufficient reason is given for not inserting it in the original answer, *Scott v. Carter*, 1 Y. & J. 452.

129. At the hearing of a cause the Court may permit a defendant to introduce new matter of defence by supplemental answer, under oath or otherwise, in the same manner as the Court permits an amendment of the bill at the hearing.

130. An answer or disclaimer, whether sworn within the jurisdiction of the Court, or out of the jurisdiction under a commission or otherwise, may be filed without the oath of a messenger, and without any further or other formality than is required in the swearing and filing of an affidavit.

131. Alterations or interlineations in an answer or disclaimer, made therein previously to the taking thereof, are to be authenticated according to the practice in use with respect to affidavits.

132. It shall not be necessary to issue a commission to take the answer or disclaimer of a defendant resident out of the jurisdiction of the Court, but such answer or disclaimer may be sworn or affirmed before any of the persons named in the first and third sections of the Statute passed in the 26th year of the reign of Her Majesty Queen Victoria, and chaptered 41.

Before this order, an answer sworn abroad without a commission having issued to take it, was irregular, and could not be filed, unless the plaintiff consented to its being filed without oath, *Crawford v. Polley* 1 Cham. R. 8.

The order for a commission is obtained by motion upon notice, in Chambers. As the plaintiff is entitled to join in the commission, to see the answer sworn, two days' notice of striking commissioners' names, with the names of those proposed, should be given him. If he do not name any, the defendant may sue out the commission addressed to his own commissioners, *Baron de Feucheres v. Dawes*, 5 Beav. 144.

Commissions to take answers are made returnable without delay; but this does not prevent the answer from being filed, although delay has occurred, *Hughes v. William*, 5 Hare, 211. Where the plaintiff joins, in the commission he is entitled to six days' notice of executing it; the

notice should be signed by the defendant's commissioners, and then served on those of the plaintiff.

133. An answer may be filed without oath or signature, by consent, without order. (3rd June, 1853; Ord. 12, s. 3.)

XI.—PRODUCTION OF DOCUMENTS.

134. The plaintiff or defendant may at any time after answer, or, when the application is on behalf of the plaintiff, after the time for answering has expired, obtain an order of course upon precipe, requiring the adverse party to produce, within ten days after the service thereof, all deeds, papers, writings, and documents in his custody or power, relating to the matters in question in the cause, under oath, and to deposit the same with the Clerk of Records and Writs, or a Deputy Registrar of the Court, for the usual purposes. (3rd June, 1853; Ord. 20, s. 1.)

An order obtained by a defendant before he has filed his answer, unless by special leave of the Court, is irregular and will be discharged. When a demurrer has been filed, the plaintiff is not entitled to an order to produce pending the argument of the demurrer, *Reid v. Baldwin*, V. C. Eaton, 22nd August, 1861.

A note disputing the amount claimed as due, filed in a mortgage suit, is not an answer and does not entitle the defendant to an order of course for production by the plaintiff, *Richardson v. Beaupre*, 2 Cham. R. 54.

A defendant is not entitled to an order for the production of documents by a co-defendant, *Attorney-General v. Clapham*, 10 Hare, App. 68; *Wynne v. Humberston*, 5 Jur. N. S. 5; but after decree defendant can compel production by a co-defendant, *Hart v. Montefiore*, 10 W. R. 97.

Persons not originally parties to the suit, but who will be bound by the decree, may apply for production, *Dent v. Dent*, 1 L. R. Eq. 186; after a decree for administration, any creditor may apply for production of documents relating to his claim, *Re McVeagh*, 1 D. J. & S. 399; and see *Forbes v. Tanner*, 11 W. R. 414; *Macrae v. Smith*, 2 K. & J. 411; and such parties are liable to be ordered to produce.

An arbitration which has been made a rule of Court, is not such a proceeding that the parties to it can take out a summons for production, *Re Anglo-Austrian Bank*, 10 L. T. N. S. 369.

As to discovery of documents from a company or corporation, see *Law v. London Indisputable Policy Company*, 10 Ha. App. 20; *Attorney-General v. East Dereham Corn Exchange Company*, 5 W. R. 486; *Ranger v. Great Western Railway Company*, 4 DeG. & J. 74; *Attorney-General v. Mercers' Company*, 9 W. R. 83.

A secretary made a party for discovery cannot evade discovery by resigning his situation after the filing of the bill, *Acomb v. Landed Estate Company*, 14 W. R. 337; *Carew v. Davis*, 21 Beav. 213.

If the party is required to produce or obtain information as to documents not in his possession, he is entitled to have the costs of so doing first tendered to him, *Bethell v. Casson*, 12 W. R. 200.

The documents are to be deposited at the office of the Clerk of Records and Writs, or of the Deputy Registrar, but the Court allows production at the defendant's place of business, if he states that the documents are in constant and necessary use in his business, *Grane v. Cooper*, 4 M. & C. 263; and see *Mertens v. Haigh*, Johns. 735; but it is not sufficient to shew that the books, &c., are in constant use, without also stating that they cannot be removed without inconvenience, *Hooper v. Gumm*, 2 J. & H. 602; and production is frequently ordered at the office of the solicitor of the party ordered to produce, see *Groves v. Groves*, 2 W. R. 86; in such case the solicitor may not charge the party inspecting, for attendances, *Flockton v. Peake*, 12 W. R. 1023. See also *Macdonell v. McKay*, 2 Cham. R. 141.

A plaintiff obtaining an order for production, may inspect documents which are ordinarily produced only on payment of customary fees, without payment of such fees, *Hoare v. Wilson*, 4 L. R. Eq. 1.

The plaintiff's agent, for purposes of inspection, ought to be a legal agent, or at least a general agent, and not one appointed for the special purpose, *Draper v. Manchester, &c., Railway Company*, 3 D. F. & J. 23; the order does not authorize inspection by a non-professional relation of the plaintiff, *Summerfield v. Pritchard*, 17 Beav. 9; *Williams v. Prince of Wales Assurance Company*, 23 Beav. 338; nor by a co-defendant, *Bartley v. Bartley*, 1 Drew. 233; but on special application, and on a special case being made out for it, an accountant may be allowed to inspect, *Bonnardet v. Taylor*, 1 J. & H. 383; but not an accountant who has any personal interest in the case, *Draper v. Manchester, &c., Rail. Co.*, 3 D. F. & J. 23; and see *Re Joint Stock Discount Co*, 15 W. R. 99; *Swansea Vale Rail. Co. v. Budd*, 2 L. R. Eq. 274.

The party called upon to produce must make the affidavit, though he insists that he cannot be compelled to produce any documents, for the question of liability to production is distinct from the sufficiency of the affidavit, *Rumbold v. Forteath*, 3 K. & J. 44; *Lazarus v. Mozley*, 5 Jur. N. S. 1119; *Nicholl v. Jones*, 13 W. R. 451; see to *Manby v. Beuicks*, 27 L. T. 55; *Quin v. Ratcliffe*, 9 W. R. 65; *Hanslip v. Kitton*, 1 D. J. & S. 440.

A plaintiff seeking to establish a partnership, is not bound by the de-

defendant's view of the relevancy or otherwise, of papers which he seeks to have produced, and although the defendant swears positively that they have no bearing on the case made by the bill, the Court will order their production, *Saunders v. Furnival*, 2 Cham. R. 49.

Where the affidavit filed is insufficient, the party requiring production should not move to commit, but should move for an order that the party required to produce do file a further and better affidavit; see *Lazarus v. Mosely*, 5 Jur. N. S. 1119; *Rumbold v. Forteach*, 3 K. & J. 44; *Harford v. Lloyd*, 2 W. R. 537; *Rhodes v. Nield*, 1 Cham. R. 131.

185 Neither plaintiff nor defendant is to be bound to produce, in pursuance of such order, any deed, paper, writing or document, which a defendant admitting the same by his answer to be in his custody or power would not be bound to produce. (3rd June, 1853; Ord. 20, s. 1.)

Whatever discovery a defendant would have been bound to give by answer, with respect to documents in his possession, must now be furnished by the affidavit on production, and the ground upon which he relies to excuse production must be stated with the same particularity, *Nicholl v. Elliott*, 3 Grant, 536.

Where a party admits documents to be in his possession, he is *prima facie* bound to produce them, or assign a sufficient reason why he should not, *Green v. Aimey*, 2 Cham. R. 138.

A party must produce relevant documents in the possession of his solicitor or agent, and cannot refuse because the solicitor says they are irrelevant, *Manby v. Bewicke*, 8 D. M. & G. 476; *McIntosh v. Great Western Rail. Co.*, 4 DeG. & Sm. 544; nor can the solicitor refuse because he claims his ordinary lien, *Lockett v. Carey*, 10 Jur. N. S. 144; *Hope v. Liddell*, 7 D. M. & G. 331; *Re Cameron's Coalbrook Rail. Co.*, 25 Beav. 1; but see *Re Gregson*, 26 Beav. 87; *North v. Huber*, 29 Beav. 437; if they are the agent's private property they need not be produced, *Colyer v. Colyer*, 9 W. R. 452; but see *Bishop of Winchester v. Bowker*, 9 W. R. 404.

Where the documents are in a foreign country, the party required to produce must shew not only that it would be difficult to obtain them, but that he has tried and failed, *Mertens v. Haigh*, 11 W. R. 792.

Documents in the possession of a stranger prior to the institution of the suit, cannot be ordered to be produced in his absence, *Burbridge v. Robinson*, 2 Mac. & G. 244; and see *Bethell v. Casson*, 1 H. & M. 806; so, where a person not a party to the suit, has a joint interest in the documents, they will be protected, but full information must be given by the affidavit, *Edmonds v. Foley*, 30 Beav. 282; *Bayley v. Cass*, 10 W. R. 370;

Ford v. Dolphin, 1 Drew. 222; *Lord Eglinton v. Lamb*, 14 W. R. 170; *Penney v. Goode*, 1 Drew. 474; *Reid v. Langlois*, 1 Mac. & G. 627.

But where a party had in his possession letters written to him by a person not a party to the suit, which were admitted to be material, he was compelled to produce them, though they were marked "private and confidential," and the sender objected to their production, *Hopkinson v. Lord Burleigh*, 2 L. R. Ch. 447; *Wiman v. Bradstreet*, 2 Cham. R. 77; and see *Penkethman v. White*, 2 W. R. 380; *Lee v. Hamerton*, 12 W. R. 975. In such a case an undertaking must be given, not to use the letters for any collateral purpose, *Richardson v. Hastings*, 7 Beav. 354; *Hopkinson v. Lord Burleigh*, 2 L. R. Ch. 447; and generally where a party obtains an order for production and inspection of documents, he does so upon an implied understanding not to make public any information so obtained, or to communicate such information to persons not parties in the suit, *Williams v. Prince of Wales Assurance Co.*, 23 Beav. 338. See too *Reynolds v. Godlee*, 4 K. & J. 88; *Enthoven v. Cobb*, 5 DeG. & Sm. 595; 2 D. M. & G. 632; *Bowen v. Pearson*, 11 W. R. 819.

Even if the Court should hold that there are grounds for not ordering production of the documents, on account of a third person's interest therein, still the party must give all the information in his power as to such documents as he has partial possession of, and make discovery of their contents so far as they are material, *Taylor v. Rundell, Cr. & Ph.* 104; *Bovill v. Cowan*, 15 W. R. 608; *Clinch v. Financial Corporation*, 2 L. R. Eq. 271.

The general rules as to privilege are applicable to the protection of documents from discovery, *Wadeer v. East India Co.*, 2 Jur. N. S. 407; *Clegg v. Edmonson*, 22 Beav. 125.

A party cannot be compelled to produce communications between himself and his solicitor relating to the matter in litigation, though no dispute had arisen at the time they were written, *Ford v. De Pontes*, 7 W. R. 299; *Lawrence v. Campbell*, 4 Drew. 485; *Simpson v. Brown*, 33 Beav. 482; communications with a former solicitor, *Marriott v. Anchor &c. Company*, 3 Giff. 304; *Wilson v. Brunskill*, 2 Cham. R. 147; but see *Patch v. Ward*, 1 L. R. Eq. 436; and see *McDonald v. Putman*, 11 Grant, 258.

Communications with a solicitor out of the jurisdiction, or the solicitor's clerk, or an accountant or skilled person employed by the solicitor, are within the principle, *Lawrence v. Campbell*, 4 Drew. 485; *Steele v. Stewart*, 1 Ph. 471; *Churton v. Frewin*, 2 Dr. & Sm. 390; *Hooper v. Gumm*, 10 W. R. 644. The privilege does not extend to communications made to the solicitor but not in his character of solicitor, *Thomas v. Rawlings*, 27 Beav. 140; and see *Hampson v. Hampson*, 26 L. J. Ch. 612; nor to letters passing between co-defendants, *Betts v. Menzies*, 26 L. J. Ch. 528; nor to the information which the solicitor has derived from collateral sources, not directly from the client, *Marsh v. Keith*, 1 Dr. &

Sm. 342; *Ford v. Tennant*, 32 Beav. 162; *Re Land Credit Society*, 15 W. R. 703.

The solicitor cannot object to produce if his client does not object, *Re Cameron's Coalbrook Rail. Co.* 25 Beav. 1.

Professional opinions given partly for the benefit of the party requiring production are not privileged, *Reynolds v. Godlee*, 4 K. & J. 88; *Talbot v. Marshfield*, 13 W. R. 885; *Wynne v. Humberstone*, 27 Beav. 421; 32 L. T. 306.

Where fraud is charged, no privilege can be claimed for documents relating to the alleged fraud, *Feaver v. Williams*, 11 Jur. N. S. 902; *Phillips v. Holmer*, 15 W. R. 578; but see *Charlton v. Coombes*, 4 Giff. 372; *Mornington v. Mornington*, 2 J. & H. 697.

Documents tending to criminate are privileged, see *Waters v. Earl of Shaftsbury*, 14 W. R. 259; *Howe v. McKernan*, 30 Beav. 547; but it is not the practice to allow either of the Statutes of Elizabeth to be an excuse for resisting discovery, *Bunn v. Bunn*, 12 W. R. 561.

Documents which have manifestly no bearing on the issue to be tried or which relate exclusively to the defendant's own title, or to the evidence by which his case is to be established, need not be produced, *Daw v. Eley*, 2 H. & M. 725; *Ingilby v. Shafto*, 33 Beav. 31; and see *Turney v. Bayley*, 12 W. R. 633; *Manuel v. Feeny*, 2 J. & H. 323; *De la Rue v. Dickenson*, 3 K. & J. 388; *Crossley v. Stuart*, 1 N. R. 426; *Kay v. Hargreaves*, 14 L. T. N. S. 281.

The party refusing to produce must shew that the documents relate to his title, and do not relate to that of the opposite party, *Clegg v. Edmondson*, 3 Jur. N. S. 299; *Lind v. Isle of Wight Ferry Co.*, 8 W. R. 540; *Bishop of Winchester v. Bowker*, 29 Beav. 479; *Felkin v. Lord Herbert*, 9 W. R. 756; *Bolton v. Corporation of Liverpool*, 1 M. & K. 68; *Jenkyn v. Bushby*, 14 W. R. 531.

But a defendant cannot refuse production, merely on the ground that if the plaintiff's claim is unfounded, he has no interest in the documents, *Gresley v. Mousley*, 2 K. & J. 288; and see *Rumbold v. Forteath*, 3 K. & J. 44; *Ferrier v. Atwood*, 14 W. R. 597; *Bugden v. South*, 26 L. J. Q. 425; *Bates v. Master of Christ's College, Cambridge*, 26 L. J. Ch. 449; *Quin v. Ratcliffe*, 9 W. R. 65; but see *Robson v. Flight*, 33 Beav. 268.

If a mortgagee denies the title of a mortgagor claiming to redeem, he must produce the mortgage deed, *Patch v. Ward*, 1 L. R. Eq. 436; *Jones v. Jones*, Kay. App. 6; *Bridgewater v. DeWinton*, 12 W. R. 40; but not where he submits to be redeemed, *Howard v. Robinson*, 4 Drew. 522; *Weeks v. Stourton*, 13 W. R. 489; see *Freeman v. Butler*, 33 Beav. 289; *Smith v. Barnes*, 1 L. R. Eq. 65.

A party need not produce documents relating only to his mode of conducting his case, *Ingilby v. Shafto*, 33 Beav. 31; *Gaudes v. Stansfield*, 4 DeG. & J. 1; *Peile v. Stoddart*, 1 Mac. & G. 192; *Turner v. Burkenshaw*, 11 W. R. 851.

The party producing may seal up irrelevant parts, *Mansel v. Feeny*, 2 J. & H. 320; *Talbot v. Marshfield*, 1 L. R. Eq. 6; a party may make copies of all parts of the document produced, not sealed up, *Coleman v. West Hartlepool Harbour Co.*, 5 L. T. N. S. 266.

As to where the parts of a document for which privilege is claimed are so interspersed with the rest of the document that sealing up would be impossible, see *Churton v. Frewen*, 2 Dr. & S. 390; *Carew v. White*, 5 Beav. 172.

136. The order shall not require personal service. If the party required to obey the same has a solicitor, it is to be sufficient to serve the same upon the solicitor. (3rd June, 1853; Ord. 46, s. 9.) 77

If the party required to produce does not obey the order, the proper course to enforce production is to serve him with a notice of motion to commit.

This notice must be served four clear days, *Kelly v. Smith*, 1 Cham. R. 364; and may be served on the solicitor of the party, Ord. 296.

137. The affidavit to be made by the party who has been served with the order may be in the form or to the effect set forth in schedule G hereunder written. (3rd June, 1853; Ord. 20, s. 2.)

XII.—EXAMINATION OF PARTIES.

138. Any party to a suit may be examined by the party adverse in point of interest, without any special order for that purpose; and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination, as any witness, except as hereinafter provided. (3rd June, 1853; Ord. 22, s. 1.)

The examination under this order may be had, in the case of the plaintiff, at any time after answer, and before and at the hearing of the cause, and in the case of defendant, at any time after answer, or the time for answering has expired, Ord. 140.

The defendant may examine the plaintiff before a special examiner under this order, though the cause has been set down and notice of examination and hearing served, *Clarke v. Hawke*, 1 Cham. R. 346.

A defendant has a right to examine the plaintiff as soon as his answer is filed, though there are other defendants who have not answered, and notice of the examination need not be served on such other defendants, *Fowler v. Boulton*, 12 Gr. 437; service on the solicitor of a copy of the Examiner's appointment for the examination of a party is sufficient notice, and the appointment need not name the parties at length, *Ibid*; by amending the bill the defendant does not postpone his liability to be examined till the time for answering the amended bill has expired, *Ibid*.

Where a party duly served with a subpoena, and the Examiner's appointment, does not attend to be examined, a motion that he do attend at his own expense or stand committed may be made *ex parte*, unless the Court sees fit to direct notice to be given, *Ibid*; but see *Weir v. Matheson*, 1 Cham. R. 224.

Where the party refuses or neglects to attend, the Court may order the bill to be taken *pro confesso*, or dismissed as the case may be, *Ord. 144*; *Prentiss v. Bunker*, 4 Gr. 147.

A defendant may be examined *viva voce* in support of a motion, notice of which has been given, although the time for answering has not expired, *McClennaghan v. Buchanan*, 7 Grant, 92. The examination of a defendant under this order is a substitute for the discovery by answer; the depositions of the defendant, taken under this order may be read at the hearing, and it is not necessary to call him as a witness at the examination of witnesses, *Proctor v. Grant*, 9 Grant, 31; and the examination of a plaintiff by a defendant would be equally admissible at the hearing, *Ibid*. Where a defendant has been examined on his answer; the answer and examination may be read in connection, and used as an affidavit in support of a motion for decree, *Mather v. Short*, 14 Grant, 254.

A demurrer having been allowed, and leave given to amend, an application for a commission to examine the defendant, before amending the bill, was refused, *Chance v. Henderson*, 1 Cham. R. 30.

A party to the suit having received notice of being examined by the opposite party, is not entitled to call for the production of papers in the possession of his adversary, in order the better to enable him to give his testimony, *Howcutt v. Rees*, 2 Gr. 268.

139. A person for whose immediate benefit a suit is prosecuted or defended, is to be regarded as a party for the purpose of Order 138. (3rd June, 1853; Ord. 22, s. 1.)

140. A plaintiff may be so examined at any time after answer, and before and at the hearing of the cause; and a defendant may be examined at any time after answer,

or after the time for answering has expired. (3rd June, 1853; Ord. 22, s. 7.)

141. A party so examined may be further examined, on his own behalf, in relation to any matter respecting which he has been examined in chief. (3rd June, 1853; Ord. 22, s. 3.)

142. Where one of several plaintiffs or defendants, who are joint contractors, or united in interest, has been examined, any other plaintiff or defendant, united in interest, may also be examined on his own behalf, or on behalf of those united with him in interest, to the same extent as the party actually examined. (3rd June, 1853; Ord. 22, s. 3.)

143. Such explanatory examination must be proceeded with immediately after the examination in chief, and not at any future period, except by leave of the Court. (3rd June, 1853; Ord. 22, s. 3.)

144. A person refusing or neglecting to attend at the time and place appointed for his examination, or refusing or neglecting to obey an order for production of documents, may be punished as for a contempt; and the party who desires the examination, or production, in addition to any other remedy to which he may be entitled, may apply to the Court, upon motion, either to have the bill taken *pro confesso*, or to have it dismissed, according to circumstances. (3rd June, 1853; Ord. 22, s. 5.)

145. The Court, upon such application, may, if it thinks fit, order either that the bill be taken *pro confesso*, or that it be dismissed, as the case may be; or make such order as seems just. (3rd June, 1853; Ord. 22, s. 5.)

146. Where the examining party uses any portion of

the examination so taken, it shall be competent for the party against whom it is used to put in the entire evidence so taken, as well that given in chief as that in explanation. (3rd June, 1853; Ord. 22, s. 6.)

147. A party to the record who admits, upon his examination, that he has in his custody or power any deed, paper, writing, or document relating to the matters in question in the cause, is to produce the same for the inspection of the party examining him, upon the order of the Court, or of the Master, or Examiner, before whom he is examined, and for that purpose a reasonable time is to be allowed. But no party shall be obliged to produce any deed, paper, writing, or document which would have been protected under the former practice. (3rd June, 1853; Ord. 22, s. 4.)

As to production of documents, see Orders 134 & 135, and notes.

148. Either party may appeal from the order of the Master, or Examiner; and thereupon such Master, or Examiner, is to certify under his hand the question raised and the order made thereon; and the costs of appeal are to be in the discretion of the Court. (3rd June, 1853; Ord. 22, s. 4.)

XIII.—REPLICATION—JOINING ISSUE.

149. One replication only is to be filed in a cause, unless the Court orders otherwise; it is to be in the form set forth in Schedule H hereunder written, or as near thereto as circumstances admit and require; and upon the filing of the replication the cause is to be deemed at issue. (3rd June, 1853; Ord. 18, s. 1.) (*Eng. Con. Ord. 17, r. 2.*)

Where by error, plaintiff has filed replication before all the defendants have answered, leave may be given (but only on notice of motion) to file

a fresh replication, *Stinton v. Taylor*, 4 Hare, 608; and see *Rogers v. Hooper*, 2 Drew. 97. After replication filed, an order of course to amend is irregular, *Hitchcock v. Jaques*, 9 Beav. 192.

Where the plaintiff had set the cause down for examination and served notice without a replication being filed, leave to file one *nunc pro tunc* was given on payment of costs, *Beckett v. Rees*, 1 Grant, 434.

Applications to withdraw replication cannot be made after witnesses have been examined, *Gascoigne v. Chandler*, 3 Swanst 420; *Bousfield v. Mould*, 1 DeG. & Sm. 347; and see *Horton v. Brocklehurst*, 29 Beav. 503.

A supplemental answer may be filed, by consent, after replication is filed, without withdrawing it, *Parsons v. Hurdy*, 21 L. J. Ch. 400.

An application for leave to withdraw replication and amend the bill by adding parties where the cause had been set down for examination, and where the amendment would postpone the examination till the following term, was refused with costs, the plaintiffs having been guilty of laches in making the application, *Woodstock v. Niagara*, 1 Cham. R. 166.

150. A plaintiff is to admit in his replication such facts alleged by the answer as are to the knowledge of the plaintiff true; or as he can readily ascertain to be true, or as he has reason to believe and doth believe to be true; and it shall be sufficient if such admissions are expressed to be only for the purposes of the suit in which the same are made. (6th Feb., 1865; Ord. 7.)

151. Admissions are, in all cases where it is practicable, to be by reference to the numbers of the paragraphs in the answer to which they relate, with such qualifications as may be necessary or proper for protecting the interests of the party making the admissions; and it shall not be necessary or proper to allege ignorance of any fact stated in the answer, or any other reason for not admitting any fact therein alleged. (6th Feb., 1865; Ord 9.)

152. Where the plaintiff has not obtained an order to amend his bill, he is either to file his replication, or set down the cause to be heard on bill and answer, within one month after the filing of the last answer. (3rd June, 1853; Ord. 18, s. 2.)

The "last answer" means the last answer of all the defendants, *Collett v. Preston*, 3 Mac. & G. 432; *Arnold v. Arnold*, 1 Phill. 805; *Forman v. Gray*, 9 Beav. 200; *Stinton v. Taylor*, 4 Hare, 608.

The time of the long vacation is not reckoned in the computation of the time allowed for filing replications, or setting down causes under this order, *Ord.* 408.

153. Where the plaintiff amends his bill, and no answer is put in thereto, and no notice of an application for further time to answer is served, within seven days after service of the bill as amended, the plaintiff, after the expiration of such seven days, but within fourteen days from the time of the service of the bill, is either to file his replication, or set down the cause to be heard upon bill and answer, or serve notice of motion for a decree. (3rd June, 1853; *Ord.* 18, s. 3.)

154. Where the plaintiff amends his bill after answer, and a defendant, within seven days after the service of the bill as amended, serves notice of an application for further time to answer the amendments, but such application is refused, the plaintiff is, within fourteen days after such refusal, either to file his replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree. (3rd June, 1853; *Ord.* 18, s. 3.)

155. Where a defendant puts in an answer to amendments, the plaintiff must either file his replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree, within fourteen days after the filing of such answer, unless he obtains, in the meantime, an order for leave to amend the bill. (3rd June, 1853; *Ord.* 18, s. 3.)

XIV.—NOTICE TO ADMIT.

156. After replication is filed, any party may call on the other by notice to admit any document, saving all

just exceptions; and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the hearing the Judge certifies that the neglect or refusal to admit was reasonable; and no costs of proving any document are to be allowed, unless such notice is given, except in cases where the omission to give the notice was in the opinion of the taxing officer a saving of expense. (6th Feb. 1865; Ord. 16.)

This order is founded upon the Imp. Act 21 & 22 Vic. c. 27, s. 7, which is, however, limited to cases "in which all parties to the suit are competent to make admissions."

Admissions cannot be made on the part of an infant, unless perhaps when the admissions are for his benefit, *Daniel's Pr.*, 167; but assignees in bankruptcy, and a married woman whose husband was a co-defendant, were held to be competent under the corresponding section of the English Act, *Churchill v. Collier*, 1 N. R. 82.

The order has been held to apply to all documents the party intends to adduce in evidence, and is not confined to such only as are in his custody or control, *Rutter v. Chapman*, 8 M. & W. 388, including foreign judgments, *Smith v. Bird*, 3 Dowl. 641, and documents the validity of which is directly in issue, *Spencer v. Barrough*, 9 M. & W. 425.

The admission of handwriting of a bill of exchange did not preclude an objection to admissibility for want of a stamp, nor admission of signature sufficient to dispense with the production of the original document, *Vane v. Whittington*, 2 Dowl. N. S. 757. Nor did the admission of a copy, being a mere copy, allow that copy to be used in the unexplained absence of the original, *Sharpe v. Lamb*, 11 A. & E. 805.

An unintentional admission, contrary to the fact, having occurred in an answer, a supplemental answer was allowed to be filed on payment of costs, *Cooper v. Ultoneter Burial Board*, 1 H. & M. 680.

157. The notice may be in the form set forth in Schedule I hereunder written, and is to be served not less than two clear days before the day appointed for inspection. (6th Feb. 1865; Ord. 17 and 18.)

XV.—SETTING DOWN AND HEARING.

158. Any party to the suit may apply to the Court upon notice to all parties, to change the venue, and there-

upon the Court is to make such order as the circumstances of the case require, and the order is to be upon such terms and conditions, as to costs and otherwise, as the Court thinks right to impose. (23rd Dec. 1857; Ord. 2, s. 2.)

The practice as to changing the venue is the same as the practice at law, for changing the venue on special grounds. The application should not be made until after issue joined, or until it can be clearly seen what the issue will be, *Begg v. Forbes*, 23 L. J. C. B. 222; *Hodge v. Churchward*, 5 C. B. 495; *Dowler v. Collis*, 4 M. & W. 531.

As the plaintiff has to elect before filing his bill at what place he will bring his cause on, an application to change the venue is generally made on behalf of the defendants. As to the circumstances necessary to be shewn to obtain an order changing the venue, see *Archbold's, Pr.*, 1352.

Where on an application to change the venue it was objected that publication having passed, the motion should have been to open publication, and to amend the bill by introducing words, changing the venue, a new motion was allowed to be made at once without notice, and the application granted on terms, *Baxter v. Campbell*, 2 Cham. R. 39.

159. Where issue has been joined three weeks before the commencement of the next ensuing hearing term at the place where the venue is laid, publication is to pass at the close of the term. (23rd Dec. 1857; Ord. 2, s. 5.)

160. Where issue has been joined less than three weeks before the commencement of the next ensuing hearing term at the place where the venue is laid, publication is to pass at the close of the following term. (23rd Dec. 1857; Ord. 2, s. 5.)

161. At any time after issue joined, the cause may be set down for hearing by any party to the cause. (23rd Dec. 1857; Ord. 2, s. 6.) ✓

In England when the cause is set down for hearing by a defendant, it is sufficient for him to serve notice thereof on the plaintiff; it is the duty of the plaintiff to serve the other defendants, *Clarke v. Dunn*, 5 Mad. 474; *Smith v. Wells*, 6 Mad. 193; but see Ord. 163, which requires the

defendant, where he sets down the cause, to serve notice of hearing on the other parties to the cause.

162. If the plaintiff neglects to set down the cause for hearing, at the next sittings at the place where the venue is laid, in case issue has been joined three weeks before the commencement of such sittings, the defendant may set the cause down for hearing at the next ensuing sittings, or at Toronto on any Monday on which the Court sits for hearing causes, and may serve notice of hearing on the other parties to the cause. (23rd Dec. 1857; Ord. 3, s. 6.)

The old Order 3, of Dec., 1857, s. 6, allowed the defendant to set the cause down for hearing, if the plaintiff neglected to set the same down within one month after publication had passed.

Where the defendant set a cause down for hearing before the time limited had expired, and the plaintiff moved to strike the cause out of the list for irregularity, it was struck out with costs, although by the plaintiff's delay in giving notice of the irregularity, the defendant was unable again to set the cause down for the ensuing term, *City of Toronto v. McGill*, 1 Cham. R. 16.

163. Causes set down for hearing are to be entered with the Clerk of Records and Writs, or a Deputy Registrar, at least fourteen days before the commencement of the next ensuing term at the place where the venue has been laid; and notice is to be served by the party setting the same down upon all parties at least fourteen days before the commencement of the term. (23rd Dec. 1857; Ord. 2, s. 7.)

See note to Order 161.

164. The Clerk of Records and Writs, or the Deputy Registrar is to prepare a list of all causes entered for hearing, and each cause is to be entered in such list in the order in which it has been set down, and causes are to be called on according to the list. (23rd Dec., 1857; Ord. 3, s. 4.)

165. Where the hearing is to be had in any town or place, other than that in which the pleadings are filed, it shall be the duty of the party setting down the cause to deliver to the Clerk of Records and Writs, or the Deputy Registrar with whom the pleadings are filed, a sufficient time before the day fixed for the hearing, a precipe requiring him to transmit to the Registrar or Deputy Registrar, at the place where the hearing is to be had, the pleadings and such other papers as may be specified in the precipe; and at the same time to deposit with him a sufficient sum to cover the expense of transmitting and re-transmitting such pleadings and papers; and thereupon it shall be the duty of the Clerk of Records and Writs, or deputy Registrar, forthwith to transmit the pleadings and such other papers as may be specified, accordingly. (10th Jan. 1863; Ord. 3.)

This order is an extension of the original order of January, 1863, which provided for the transmission of the pleadings only.

166. No evidence to be used on the hearing of a cause other than the examination of a party under Order 138, is to be taken before any Examiner or Officer of the Court, unless by the order first had of the Court or a Judge thereof, upon special grounds adduced for that purpose. (10th Jan. 1863; Ord. 2.)

At the hearing of any cause, or of any further directions therein, affidavits of particular witnesses, or affidavits as to particular facts and circumstances may be used by consent, or by leave of the Court; and such consent may be given on behalf of persons under disability, with the approbation of the Court, *Ord. 176*.

Formerly any exhibit which might have been proved *viva voce* at the hearing, might be proved by the affidavit of a witness who would have been competent to prove the same at the hearing, an order having been taken out for that purpose.

It is presumed that under the present practice, deeds and other documents, which might have been proved by affidavit under an order obtained for that purpose, will be permitted to be proved in a similar way, where no injustice will be done to the opposite party by permitting such mode of proof.

Nothing could be proved *viva voce* under such an order, that required more than the proof of handwriting, or that admitted of cross-examination *Lake v. Skinner*, 1 J. & W. 15; *Pomfret v. Windsor*, 2 Ves. Sen. 479; and a will could not be proved at the hearing as a deed could, *Harris v. Ingledew*, 3 P. Wms. 93; nor a deed, when the defendant by his answer alleged fraud in connection with the obtaining of it, *Barfield v. Kelly*, 4 Russ. 355.

Where the execution of a deed is not contradicted, but its validity only is disputed, it may be proved *viva voce* at the hearing, *Booth v. Creswick*, 8 Jur. 323.

When a cause is set down for hearing upon bill and answer, exhibits may be proved at the hearing by affidavit, *Killaly v. Graham*, 2 Grant 281; *New v. Fitzgerald*, 2 Dr. & W. 530; *Chalk v. Raine*, 13 Jur. 981.

When an instrument is produced upon notice by an adverse party who claims an interest in the cause under such instrument, the party calling for production is not bound to prove its execution, *Chisholm v. Sheldon*, 2 Grant, 178.

167. Witnesses resident out of the jurisdiction may be examined, as heretofore, upon commission. (23rd Dec. 1857; Ord. 2, s. 3.)

The costs of a foreign commission form part of the costs in the cause, *Colborne v. Thomas*, 4 Grant, 169.

Where a defendant refused to attend before commissioners appointed to take his evidence abroad, the usual order to set the cause down, to be taken *pro confesso*, was made, *Prentiss v. Bunker*, 4 Grant, 147.

As to opening publication and allowing the issue of a foreign commission, see *Blain v. Terryberry*, 1 Cham. R. 104.

After notice of motion served for an order to administer the estate of an intestate, a commission may be obtained for the examination of witnesses, with a view of establishing the fact that the party applying for the order is one of the next of kin of the intestate, *Farrell v. Cruikshank*, 1 Cham. R. 12.

It is not necessary to obtain an order for leave to open a foreign commission which has been duly returned; the proper practice is to open it without order in the presence of all parties, *Chalmers v. Pigott*, 1 Cham. R. 285; but see *Neale v. Withrow*, 4 U. C. L. J. 88.

168. When a cause is called on to be heard, the witnesses of all parties are to be examined, unless the Court, upon a previous application, has postponed the examination; or unless the Judge before whom the cause is brought on sees fit to postpone the examination, or to

allow time for the production of further evidence ; and where the examination is postponed, or where time is allowed for the production of further evidence, the order is to be upon such terms, as to the costs or otherwise, as the Court thinks right to impose. (23rd Dec., 1857 ; Ord. 2, s. 10.)

The examination of a witness *de bene esse* is permitted where there is danger of losing the testimony of an important witness from death, by reason of age, (as where the witness is seventy years old and upwards) or dangerous illness, or where he is the only witness to an important fact.

Where the reason for the application is, that the witness is dangerously ill, or over 70 years of age, the order may be obtained *ex parte*, *McKenna v. Everitt*, 2 Beav. 288 ; *Oliver v. Dickey*, 2 Cham. R. 87 ; but unless the illness is dangerous, notice must be given, *Anderson v. Anderson*, 1 Cham. R. 291.

So where the application was made because the witness was about to leave the jurisdiction, an *ex parte* order was refused, *Early v. McGill*, 1 Cham. R. 257.

On an application for an order to examine *de bene esse* on the ground that the witness is the only one who can prove a fact, affidavits should be produced shewing the particular facts as to which he can give evidence and that he is the only witness, *Pearson v. Ward*, 1 Cox. 177 ; *Hope v. Hope*, 3 Beav. 317.

The plaintiff may, in a proper case, obtain an order for the examination of a witness *de bene esse*, as soon as his bill is filed, *Dew v. Clarke*, 1 S. & S. 108 ; but a defendant cannot obtain such an order till he has answered, *Williams v. Williams*, 1 Dick. 92.

All parties are entitled to notice of the time and place of the examination, *Loveden v. Milford*, 4 L. & C. O. 540.

169. Causes are to be argued at the same time that the witnesses are examined. (10th Jan. 1863 ; Ord. 2.)

170. A defendant may be examined as a witness without an order for that purpose, on behalf either of the plaintiff or of a co-defendant, upon points as to which the party to be examined is not interested. A plaintiff may be examined, without an order, under similar circumstances, by a co-plaintiff or by a defendant. (3rd June, 1853 ; Ord. 22, s. 2.)

171. Such examination is not to preclude the Court from making a decree either for or against the party examined, and the evidence given on such examination may be rebutted by adverse testimony. (3rd June, 1853; Ord. 22, ss. 2 and 3.)

172. A witness may be recalled for further examination, as in trials at *nisi prius*, without any order of the Court having been obtained for that purpose. (23rd Dec. 1857; Ord. 2, s. 12.)

173. Articles are not to be filed for the purpose of discrediting a witness: but witnesses may be called for that purpose, without the leave of the Court; and they are to be examined at the same time as the other witnesses, unless the Court otherwise orders. (23rd Dec. 1857; Ord. 2, s. 13.)

174. Any party is to be at liberty to make use of the evidence of a witness adduced by another party to the suit. (23rd Dec. 1857; Ord. 2, s. 15.)

175. A party shall be entitled, upon notice without order, to use depositions taken in another suit, in cases where under the former practice he was entitled, upon obtaining the common order for that purpose, to use such depositions. (28th April, 1862.)

176. At the hearing of any cause, or of any further directions therein, affidavits of particular witnesses, or affidavits as to particular facts and circumstances, may be used by consent, or by leave of the Court; and such consent may be given on behalf of persons under disability, with the approbation of the Court. (3rd June, 1853; Ord. 20, s. 4.)

Affidavits have been admitted at the hearing as evidence that no appointment of trust funds had been made by deceased persons, in support of a suit by a party claiming in default of appointment, *Devey v. Thornton*,

9 Ha. 222, 233; and see *Smith v. Leathart*, 20 L. J. Ch. 202. So, where a class of children was interested, the Court, instead of directing the preliminary class inquiry, received the affidavits of the parents proving the class, and then allowed the cause to be heard, *Bush v. Watkins*, 14 Beav. 33; and see *Bear v. Smith*, 5 DeG. & S. 92; *Fowler v. Reynell*, 15 Jur. 1019.

Matters raising a new issue not noticed in the pleadings cannot be proved under this order; *Howard v. Chaffers*, 11 W. R. 585; and see *Hoghton v. Hoghton*, 15 Beav. 278.

An affidavit as to the conduct of the plaintiff cannot be received at the hearing, after the Master's report is made, *Bateman v. Margerison*, 2 W. R. 607; *Evans v. Lewis*, 2 L. T. N. S. 559; where *Fallows v. Lord Dillon*, 2 W. R. 507, was not followed.

177. Exhibits put in at the hearing of a cause are to be marked thus: "In Chancery, [*short title*]. This exhibit (the property of _____,) is produced by the plaintiff (or defendant C., as the case may be,) this day of _____ 186____, A. B.," (*Registrar or Deputy Registrar.*) (1st April, 1867; Ord. 4.)

178. Where a party or witness is examined at the hearing of a cause, or a document is put in as evidence and marked by the Registrar or the Deputy Registrar, the deposition of the party or witness so examined, or the document so put in, is not to be withdrawn as evidence without the leave of the Court. (20th Dec. 1865; Ord. 16.)

179. Where judgment is reserved, the exhibits used upon the hearing must be deposited with the Registrar, or Deputy Registrar, for the use of the Court. All exhibits deposited under this order must be described in a schedule, to be prepared by the party depositing the same. The schedule shall be in duplicate, one copy of which, signed by the Registrar, or Deputy Registrar shall be handed to the party depositing the exhibits, and the other retained for the use of the Court. Where this Order has not been complied with, the case will not be considered as standing for judgment. (13th April, 1859; Ord. 3.)

180. Where it becomes necessary to adduce evidence, or to incur expense otherwise, in order to establish or prove facts which, in the judgment of the Court upon the hearing of the cause, ought to have been admitted, it shall be competent to the Court to make such order in respect to the costs occasioned by the proof of such facts, as under all the circumstances appears to be just. (6th Feb. 1865; Ord. 11.)

181. The solicitors for the several parties are to attend in Court when a cause is appointed to be heard, and during the hearing thereof. (13th April, 1859; Ord. 2.) (*Eng. Con. Ord. 21, r. 11.*)

182. Where, upon the hearing of a cause, it appears that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally or by some person in his behalf, or having omitted to deliver any paper necessary for the use of the Court, and which, according to its practice, ought to have been delivered, such solicitor shall personally pay to the parties such costs as the Court thinks fit to award. (13th April, 1859; Ord. 2.) (*Eng. Con. Ord. 21, r. 12.*)

The solicitor is personally liable under this order, *Cook v. Broomhead*, 16 Ves. 138; *Courtney v. Stock*, 2 Dr. & W. 251.

The client not relieved of the consequences of the solicitor's neglect in ignorance of this rule without the consent of the other party, *Walmsley v. Froude*, 1 R. & M. 334.

As to restoring causes struck out on account of the absence of the counsel, see *Harvey v. Renon*, 12 Jur. 445; where, by accident, replication was not duly filed, *Atty.-Gen. v. Fellowes*, 6 Mad. 111.

183. Where a defendant makes default at the hearing of a cause, the Court is to make such decree as it thinks fit. This decree is to be absolute in the first instance, without giving the defendant a day to shew cause, and is to have the same force and effect as if the same had been a decree *nisi* in the first instance, and had been

afterwards made absolute in default of cause shewn by the defendant. (23rd Dec., 1857; Ord. 3, s. 7.) (*Eng. Con. Ord.* 23, r. 12.)

Under this rule the plaintiff takes such a decree as on the evidence and pleadings he is entitled to, *Evans v. Williams*, 6 Beav. 118; *Hakewell v. Webber*, 9 Hare, 541; and see *Hughes v. Jones*, 26 Beav. 24.

Where the affidavit of service of the subpoena to hear judgment is irregular, the cause must be set down again, *Evans v. Evans*, 2 Keen. 604; a decree taken on production of an insufficient affidavit of service, is irregular, *Powell v. Martin*, 1 J. & W. 292; *Rigg v. Wall*, 3 M. & C. 505.

184. If the plaintiff causes the bill to be dismissed, on his own application, after it has been set down to be heard; or if the cause is called on to be heard, and the plaintiff makes default, and by reason thereof the bill is dismissed; in either case, the dismissal is to be equivalent to a dismissal on the merits, unless the Court orders otherwise, and may be set up in bar to another suit for the same matter. (23rd Dec., 1857; Ord. 3, s. 8.) (*Eng. Con. Ord.* 23, r. 13.)

As the plaintiff has the entire control of the suit, he may at any time before the hearing, obtain an order dismissing the bill upon payment of the defendant's costs; and it makes no difference whether the bill is filed on his own behalf only, or on behalf of himself and all others of the same class, *Curtiss v. Lloyd*, 4 M. & C. 194; *Manton v. Roe*, 14 Sim. 353. Where there are several plaintiffs they must all join in the application to dismiss.

After the cause has been heard and is standing for judgment, the plaintiff cannot dismiss his bill except on a special application, *Smith v. Port Hope Harbour Co.*, 6 U. C. L. J. 189.

After decree, a bill cannot be dismissed, except by consent, *Cooper v. Lewis*, 2 Phill. 178; and even then only upon a rehearing, *Lashley v. Hogg*, 11 Ves. 602; whether instituted by the plaintiff on his own behalf, *Bluck v. Colnaght*, 9 Sim. 411; or on behalf of himself and others of the same class, *Handford v. Storie*, 2 S. & S. 196.

The proper course after decree, is to apply for an order to stay all proceedings, which order will be made by consent, or upon a fit case being proved, *Egg v. Dewey*, 11 Beav. 221.

Where the defendant submits to the plaintiff's demand, and the only question between the parties is the costs of the suit, it ought not to be proceeded in, but an application should be made, to the Court, to avoid the expense of further proceedings, *Sivell v. Abraham*, 8 Beav. 598; if, however, there is any question in dispute to which the defendant does not submit, the Court will not interfere summarily, and stop the suit, *Field v. Robinson*, 7 Beav. 66; *McNaughtan v. Hasker*, 12 Jur. 956.

The defendant is not entitled to a dismissal on plaintiff's default to appear, without producing a regular affidavit of service of the notice of hearing, *Rigg v. Wall*, 3 M. & C. 505; but see *Charlton v. Allen*, 9 Ha. App. 67; *Bell v. Hornby*, 14 Beav. 439.

A plaintiff has been allowed to dismiss his bill without costs, under the following circumstances: (1) If the bill was filed under a mistake common to both parties, *Broughton v. Lashmer*, 5 M. & C. 136; and see *Hansard v. Hardy*, 18 Ves. 460; (2) If the defendant has given the relief sought by the suit, *Wilde v. Wilde*, 10 W. R. 868, 503; or if the bill has become unnecessary, but was originally justified by the defendant's misconduct or fraud, *Elsev v. Adams*, 2 D. J. & S. 147; *Knox v. Brown*, 2 Bro. C. C. 186; *Goody v. Sleight*, 3 W. R. 87; but see *Ventilation and Sanitary Improvement Co. v. Edelsten*, 11 W. R. 613; (3) Where the plaintiff has been misled by a suggestion of the Court, *Lister v. Leather*, 1 DeG. & J. 361.

XVI.—DECREES AND ORDERS.

185. The evidence read upon the hearing is not to be stated in the decree, but must be entered in the Registrar's book at the time of the hearing. (3rd June, 1853; Ord. 43, s. 10.)

The evidence read by each side must be stated distinctly by counsel, in order that the same may be entered by the Registrar before the case is closed, and a schedule of all the exhibits used upon the hearing must be deposited with the Registrar, Ord. 63.

Where plaintiff reads part of a defendant's answer, the whole is to be entered as read; a defendant not called on for his defence may enter all his evidence as read; proceedings in former suits respecting the same matters, may be entered as read, *Manby v. Bewicke*, 3 Jur. N. S. 685; and on a motion for decree, wherein a plaintiff can read a defendant's answer without notice, he is entitled to have it entered as read, *Bright v. Legerston*, 29 Beav. 69; and all affidavits which have been filed, and which a

party gives notice that he will read on the hearing of a motion, though not mentioned at such hearing, should be entered as read, *Catholic Publishing &c. Co. v. Wyman*, 1 N. R. 49.

Where the reception of evidence has been objected to at the hearing, the manner of entering should be such as to shew what evidence has been received, *Watson v. Parker*, 2 Phill. 5; *Parker v. Morrell*, *Ibid*, 453. Evidence not to be entered as read *de bene esse*, *Drake v. Drake*, 25 Beav. 641.

Evidence entered as read saving just exceptions, *Gee v. Gurney*, 8 Beav. 315; but entry in that way stated by Registrar to be irregular, *Sherwood v. Beveridge*, 2 Coll. 536; and see *Handford v. Handford*, 5 Hare, 212.

Evidence which does not appear by the Registrar's minutes to have been read ought not to be ordered subsequently to be entered, *Eden v. Earl of Bute*, 1 Bro. P. C. 465.

186. It shall not be necessary in any order to reserve liberty to apply, but any party may apply to the Court from time to time as he may be advised; and where any order directs the payment of money out of Court, it shall not be necessary to direct that a cheque be drawn for the purpose.

187. Orders are to be divided into convenient paragraphs, and such paragraphs are to be numbered consecutively; and where accounts are directed to be taken, or enquiries to be made, the order may be in the form set forth in schedule J hereunder written, with such variation as the circumstances of the case require. (1st April, 1867; Ord. 8; 3rd June, 1853; Ord. 43, s. 11.)

This order is similar to *Eng. Con. Ord. 23, r. 15*.

188. In all orders, sums are to be stated in dollars and cents. (6th Feb., 1865; Ord. 45.)

189. Decrees or decretal orders are not to be enrolled until the final decree or order in the cause has been pronounced. (3rd June, 1853; Ord. 43, s. 12.)

190. If no petition for re-hearing is filed, within thirty days after the entry of the final decree or order, the Clerk of Records and Writs, at the instance of any party to the cause, is to attach together the bill, pleadings, and other proceedings, and is to annex thereto a fair copy of the decree or decretal order signed by a Judge, and countersigned by the Clerk of Records and Writs, and the papers and proceedings so annexed and signed are to remain of record in his office, and such filing is to be deemed and taken to be an enrollment of the decree for all purposes. (3rd June, 1853; Ord. 43, s. 12.)

It is not necessary to petition to enrol a decree after any lapse of time, *Anon*, 1 Gr. 168.

191. A decree founded on a bill taken *pro confesso* is to be passed and entered as other decrees. (3rd June, 1853; Ord. 14, s. 4.) (*Eng. Con. Ord.* 22, r. 10.)

It is essentially requisite to the perfect completion of every decree, that it should be passed and entered, *Drummond v. Anderson*, 3 Grant, 150.

All proceedings under a decree or order before it is entered, are irregular, *Tolson v. Jervis*, 8 Beav. 364.

192. Where a Queen's Counsel has held a sitting of the Court under the Statute in that behalf, he is to inquire close to the Registrar, as soon thereafter as may be, a statement signed by him, of his decree in each case heard by him, with the date and place of hearing, and is to set forth the terms of his decree either at full length or otherwise, as the case may require. His judgment containing the reasons for his decree, if he thinks fit to state the same in writing, is also to be transmitted to the Registrar for the information of the Court and the parties. (10th Sept. 1866; Ord. 9.)

193. A decree made by a Queen's Counsel is to be expressed in the body thereof to be the decree of the Court,

but the name of the Queen's Counsel is to be given in the margin. (10th Sept. 1866 ; Ord. 10.)

194. Interlocutory orders are not to be enrolled. (3rd June, 1853 ; Ord. 43, s. 12.)

195. No order of course, and no order obtained *ex parte* and not being of a special nature, is to be entered unless the entry thereof shall be directed by the Court or a Judge ; but this provision is not to be construed as applying to decrees or decretal orders, or to final orders for sale or foreclosure. (6th Feb. 1865 ; Ord. 20.)

196. In all cases where a person or party obtains an order from the Court, or from a Master, upon condition, and fails to perform or comply with the condition, he is to be considered to have waived or abandoned the order, as far as the same is beneficial to himself, and any other party or person interested in the matter, on the breach or non-performance of the condition, may either take such proceedings as the order in such case may warrant, or such proceedings as might have been taken if the order had not been made. (3rd June, 1853 ; Ord. 24, s. 4.) (*Eng. Con. Ord. 23, r. 22.*)

XVII.—CHAMBERS.

✓ 197. The following business shall be disposed of in Chambers, together with such other matters as the Court from time to time thinks may be more conveniently disposed of there, than in full Court, viz. :—

1. For the sale of the estates of infants, under the Consolidated Statutes of Upper Canada, chapter 12, s. 50 ;
2. As to the guardianship, maintenance, and advancement of infants ;

3. For the administration of estates upon motion, without bill ;
4. For time to answer or demur ;
5. For leave to amend bills ;
6. For changing the venue ;
7. To postpone the examination of witnesses, or to allow the production of further evidence ;
8. For the production of documents ;
- ✓ 9. Relating to the conduct of suits or matters ;
10. As to matters connected with the management of property ;
11. For the payment into Court of moneys, by parties desiring on their own behalf to pay in the same. (3rd June, 1853 ; Ord. 34, s. 1.)

In the absence of the Judge, the Judges' Secretary is to sit in Chambers, and hear any applications which the parties may choose to bring before him for this purpose, *Ord. 17.*

Whatever application can under these orders be made in Chambers, must be so made, *Moffatt v. Ruddie*, 4 Grant, 44.

The Court refused to hear, otherwise than in Chambers, a motion to extend the time for payment of mortgage money, *Anon*, 4 Grant, 61.

A commission *de lunatico inquirendo* will be granted in Chambers, *Re Stuart*, 4 Grant, 44 ; and so may a writ of *habeas corpus*, *Re Paton*, 4 Grant, 147.

For the mode of proceeding under Con. Stat. U. C. c. 12, s. 50, see *Ord. 527, et seq.*

The provisions of the statute 22 Vic., c. 93, (Con. Stat. U. C. c. 74,) have not the effect of excluding the jurisdiction of the Court of Chancery, in respect to the appointment of guardians to infants, *Re Stanard*, 1 Cham. R. 15.

The jurisdiction, where proceedings originate at Chambers, extends only to simple cases, *Rump v. Greenhill*, 20 Beav. 512.

On the death of a receiver, an application for another may be made in Chambers, *Grote v. Bing*, 9 Hare, App. 50 ; and the appointment of a receiver in the first instance, if by consent, may be made in Chambers, *Blackborough v. Ravenhill*, 16 Jur. 1085.

Order for payment into Court of purchase money may be made in Chambers, *Davenport v. Davenport*, 22 L. J. Ch. 11 ; and so should a motion to open biddings.

All applications in the nature of an appeal from a Master's judgment should be made in Court and not in Chambers, *Ledyard v. McLean*, 1 Cham. R. 188; *Fitzgerald v. Upper Canada Building Society*, *Ibid*; *Jay v. Macdonell*, 2 Cham. R. 71.

198. The course of proceeding in Chambers is ordinarily to be the same as the course of proceeding in Court upon motion. Notice of the application (where the proceeding is not *ex parte*) is to be served, in the same manner as a notice of motion returnable in open Court. In other cases, an appointment is to be obtained, which may be in a form similar to the form set forth in schedule K hereunder written, with such variation as the circumstances of the case may require. (3rd June, 1853; Ord. 34, s. 4.)

199. Where it appears upon the hearing of any matter, that, by reason of absence, or for any other sufficient cause, the service of notice of the application, or of the appointment, cannot be made, or ought to be dispensed with, such service may be dispensed with, or any substituted service, or notice, by advertisement, or otherwise, may be ordered. (3rd June, 1853; Ord. 34, s. 5.) (*Eng. Con. Ord.* 35, r. 18.)

200. Where an account is taken in Chambers, special directions may be given, with respect to the mode in which the account is to be taken and vouched; and in taking the account, the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised. (3rd June, 1853; Ord. 35, s. 1.)

In this order the word "shall" is to be read as permissive.

See notes to Order 228.

201. An accounting party is to bring in his account in the form of debtor and creditor, and verify the same by

affidavit, unless otherwise directed. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto, and is to be left at Chambers. (3rd June, 1853; Ord. 35, s. 3. (*Eng. Con. Ord. 35, r. 33.*)

As to the practice in Judges' Chambers in England with regard to requiring verified copies of accounts, see *Cannan v. Evans*, 10 Ha. App. 9.

202. A party seeking to charge an accounting party beyond what he has by his account admitted to have received, is to give notice thereof to the accounting party, stating, as far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct manner. (3rd June, 1853; Ord. 35, s. 3.) (*Eng. Con. Ord. 35, r. 34.*)

An accounting party who files an affidavit verifying his account, if he is cross examined on such affidavit, is entitled to notice of the points on which he is to be cross examined, *Re Lord* 2 L. R. Eq. 605; *Wormsley v. Sturt*, 22 Beav. 398.

203. No state of facts, charges, or discharges, are to be brought into Chambers; and where original deeds or documents can be brought in, no copies are to be made without special direction. (3rd June, 1853; Ord. 34, s. 4.)

204. Where directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, are to be supplied. (3rd June, 1853; Ord. 34, s. 4.)

205. Where in the prosecution of any proceeding under a decree, it appears that some persons, not already parties, ought to be made parties, and ought to attend, or be enabled to attend the proceedings, directions may be given for serving an office-copy of the decree upon such parties, and upon due service thereof such persons are to

be treated and named as parties to the suit, and shall be bound by the decree in the same manner as if they had been originally made parties to the suit. (3rd June, 1853; Ord. 34, s. 6.)

206. Every office-copy of a decree directed to be served under Order 205, is to be indorsed with a notice to the effect set forth in schedule L hereunder written, with such variations as circumstances may require. (3rd June, 1853; Ord. 34, s. 6.)

207. A party served with an office-copy of a decree under Order 205 may apply to the Court, at any time within fourteen days from the date of such service, to discharge the order, or to add to, set aside, or vary the decree. (3rd June, 1853; Ord. 34, s. 7.)

The time of vacation is not to be reckoned in the computation of the fourteen days, *Ord.* 408.

208. The Court may adjourn for consideration in Chambers any matter which, in the opinion of the Court may be disposed of more conveniently in Chambers; and any matter pending in Chambers may be adjourned to open Court; and such matter may be so adjourned at the request of either party, subject to such order as to costs or otherwise, as the Court thinks right to impose. (3rd June, 1853; Ord. 34, s. 3.)

209. Matters adjourned from Chambers are to be heard in Court by one Judge, unless by special leave, which may be granted *ex parte*; and without such leave are not to come before the full Court, except by way of rehearing the order made in Court thereon. (20th Dec. 1865; Ord. 14.)

210. A Judge sitting in Chambers may exercise the same power and jurisdiction, in respect of the business brought before him, as is exercised by the Court; all or-

ders made by a Judge in Chambers are to have the force and effect of orders of the Court; and all or any of the powers, authorities, and jurisdictions, given to the Master by any act or acts now in force, or by any General Order or Orders of the Court, may be exercised by the Judge sitting in chambers. (3rd June, 1853; Ord. 34, s. 2.)

XVIII.—MASTERS' OFFICE.

211. Every order referring any matter to the Master is to be brought into his office within fourteen days after the order is drawn up, or after the same should have been drawn up, by the party having the carriage of the same; otherwise any other party to the cause, or any party having an interest in the reference, may assume the carriage of the order, and carry the same into the Master's office. (3rd June, 1853; Ord. 42, s. 1.)

Under Ord. 42, s. 1, of 3rd June, 1853, the party having the carriage of the decree was required to carry it into the Master's office within fourteen days after the decree was pronounced, otherwise any other party might apply to the Court for the carriage of the reference. The time for carrying in a decree has been extended, as it is sometimes impossible to have the decree in a cause heard on circuit, drawn up and entered within fourteen days. The latter part of the order which enables any party to the cause, or any party interested in the reference, to assume the carriage of the decree without applying to the Court, where the plaintiff is delaying, will it is hoped lead to greater promptness in carrying in decrees.

Where a decree has been carried into the Master's office, Order 213 provides, that, if the party prosecuting the decree does not proceed with due diligence, the Master may give the conduct of the reference to any other person interested.

212. Where a party prosecuting a reference, does not proceed before the Master with due diligence, the Master is at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established his claim before the Master under the order, to commit to him the prosecution of the

order; and from thenceforth neither the party making default nor his solicitor is to be at liberty to attend the Master as the prosecutor of the order. (3rd June, 1853; Ord. 42, s. 10.)

This Order is a copy of English Order 56, of April, 1823.

Previous to that order, the practice of the Court was, especially in creditor's suits, in case the party whose duty it was to prosecute a decree neglected his duty, to allow a party interested as a creditor to obtain an order to prosecute in his stead, *Creuze v. Hunter*, 2 Ves. 157; *Sims v. Ridge*, 3 Mer. 458; *Powell v. Walworth*, 2 Mad. 183; *Edmunds v. Acland*, 5 Mad. 81; *Cook v. Bolton*, 5 Russ. 282; and the Court may still exercise its authority by taking the prosecution of a decree from the plaintiff and entrusting it to another, and that even after the Master has exercised his judgment upon it, and has refused the application, *Wyatt v. Sadler*, 5 Sim. 450.

This Order applies only to proceedings in the Master's office, therefore a plaintiff from whom the Master has taken the conduct of the suit, is not thereby precluded from afterwards making an application to the Court in the suit, *Whitehead v. North*, Cr. & Ph. 78.

As to the right of the party substituted under this Order, to inspect and take copies of the briefs, documents, &c., in the possession of the party from whom the carriage of the decree has been taken, see *Bennett v. Baxter*, 10 Sim. 417.

It is not irregular for the Master to act under this Order on the *ex parte* application of the defendant, *Stevenson v. Nicol*, 14 Grant, 144.

An application to compel the party having the carriage of an order made on an appeal from a Master's report to proceed with the enquiry in the Master's office, should be made to the Master who has possession of the case, and not in Chambers, *Miller v. MacNaughten*, 1 Cham R. 206.

213. Every reference is to be called on and proceeded with at the day and time fixed, unless the Master in his discretion thinks fit to postpone the same; and in granting an application to postpone the hearing of a reference, the Master may make such order, as to the costs consequent upon such postponement, as he thinks just. (3rd June, 1853; Ord. 42, s. 8.)

214. As soon as the Master has entered upon the hearing of a reference, he is to proceed therewith to the con-

clusion without interruption, where that is practicable ; and where any reference cannot be concluded in a single day, the Master is to proceed *de die in diem*, without a fresh warrant, unless he is of opinion that an adjournment other than *de die in diem* would be proper, and conducive to the ends of justice ; and when an adjournment is ordered, the Master is to note in his book the time and reason thereof. (3rd June, 1853 ; Ord. 42, s. 8.)

215. In no case is any matter to be discontinued or adjourned for the mere purpose of proceeding with any other matter, unless that course becomes necessary. (3rd June, 1853 ; Ord. 42, s. 8.)

216. Upon the bringing in of an order, the solicitor bringing in the same is to take out a warrant (unless the Master dispenses therewith) appointing a time, which is to be settled by the Master, for the purpose of taking into consideration the matters referred by the order, and is to serve the same upon the parties, or their solicitors, unless the Master dispenses therewith. (3rd June, 1853 ; Ord. 42, s. 2.)

217. Upon the return of the warrant to consider, or upon the bringing in of the reference where the warrant is dispensed with, the Master is to fix a time at which to proceed to the hearing and determining of the reference, and is to regulate in all other respects the manner of proceeding with the reference, and is to give any special directions, he thinks fit, as to :—

1. The parties who are to attend on the several accounts and enquiries ;
2. The time at which, or within which, each proceeding is to be taken ;
3. The mode in which any accounts referred to him are to be taken or vouched ;

4. The evidence to be adduced in support thereof ;
5. The manner in which each of the accounts and enquiries is to be prosecuted ;

And such directions may be afterwards varied or added to, as may be found necessary. (3rd June, 1853 ; Ord. 42, s. 2.)

This Order does not wholly exclude the jurisdiction of the Court in regulating what parties are to attend before the Master. The Master having excluded trustees of a fund from attending before him on a question of investment, the Court gave them leave to attend, *Davis v. Combermere*, 9 Jur. 76.

This Order applies as well to a reference upon motion, as to a decree, *Woodroffe v. Titterton*, 8 Sim. 238.

218. Where, at any time during the prosecution of a reference, it appears to the Master, with respect to the whole or any portion of the proceedings, that the interests of the parties can be classified, he may require the parties constituting each or any class, to be represented by the same solicitor ; and where the parties, constituting such class, cannot agree upon the solicitor to represent them, the Master may nominate such solicitor for the purpose of the proceedings before him ; and where any one of the parties, constituting such class, insists on being represented by a different solicitor, such party is personally to pay the costs of his own solicitor, of, and relating to, the proceedings before the Master, with respect to which such nomination has been made, and all such further costs as are occasioned to any of the parties by his being represented by a different solicitor from the solicitor so nominated. (20th Dec. 1865 ; Ord. 35.)

219. To enable the Master to exercise all or any of the powers conferred upon him by, or to take the accounts and make the enquiries referred to, in the following

Orders, it shall not be necessary that any of the matters therein mentioned, shall have been stated in the pleadings, or that evidence thereof shall have been given before the order of reference, or that the order shall contain any specific direction in respect thereof.

The Master has no power to relax any of the General Orders of the Court, *Smith v. Webster*, 3 M. & C. 244; *Lloyd v. Watt*, 4 M. & C. 257; *Bertolacci v. Johnson*, 2 Hare, 632.

220. Under an order of reference, the Master shall have power :

1. To take the accounts with rests or otherwise ;
2. To take account of rents and profits received, or which, but for wilful neglect or default, might have been received ;
3. To set occupation rent ;
4. To take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise, or claimed to be so ;
5. To make all just allowances ;
6. To report special circumstances ;
7. And generally, in taking the accounts, to inquire adjudge, and report as to all matters relating thereto, as fully as if the same had been specially referred. (3rd June, 1853 ; Ord. 42, s. 13.)

This section confers upon the Master much larger powers, in many respects, than even a Judge in Chambers in England possesses. It has no English original, and is confined to the practice of our own Court. Order 142 of April, 1843, is the foundation upon which it rests, but altered by the removal of certain restrictions. That order provided that the accounts

to be taken by the Master, should be taken according to the laws and practice of the Court of Chancery. This limitation in strictness of language was perhaps, unnecessary, as all accounts must have been, and must be taken in that manner, but it was not an unmeaning safeguard and was a plain intimation to the Master of his duty, and the mode of pursuing it. And there was a proviso that claims for improvements should not be entertained unless a case was made upon the pleadings for them.

Upon all the matters of account mentioned in this section, a case must be made before the Master, such as, under the former practice, required to be made upon the pleadings, to authorize the Court to make a decree upon them. Reference to the cases which determine liability upon the pleadings is therefore necessary to ascertain the extent and the limits of the Master's power. It is proposed to note them upon the several matters referred to in this section in the order in which they are mentioned.

I. AS TO TAKING ACCOUNTS WITH RESTS.

There is some ambiguity in the meaning of this phrase. Formerly it seems to have been considered as nothing more than ascertaining the amount due at specified times from an accounting party, but not necessarily involving the amalgamation of principal with interest, or turning the interest into capital,—in which sense it was little more than an enquiry to ascertain balances. But the technical meaning it has now acquired may be expressed as a statement of the amount due at specified times, including both principal and interest, and the sum so found due forms the principal upon which interest is to be calculated,—or in other words it charges the accounting party with compound interest, *Raphael v. Boehm*, 11 Ves. 92; *Bennett's Practice in the Master's Office*, 136.

Rests most frequently occur in accounts against (1) executors and trustees, and (2) in accounts against mortgagees.

(1) *In accounts against executors and trustees.*

The following rules appear to be the result of the cases, but it is impossible to state any rules which will reconcile all the cases, and be consistent with themselves. (a) Executors and trustees retaining balances in their hands, in neglect merely of the duty imposed by law, will be charged with simple interest only;—(b) But if the instrument creating the trusts direct an accumulation of the funds, the neglect to invest will be considered as a positive breach of trust, and rests ordered;—(c) If the trustee have employed the funds in trade or for his own benefit, whether there be a direction for accumulation, or not, the *cestui que trust* has the option of taking the profits of the employment of the fund, or of charging him with interest and rests. In this class of cases great doubt still exists whether rests will be directed as a matter of course, or whether it does not require a special case of misconduct to charge more than simple interest but the better opinion seems to be that where an account of profits might be had, rests will be directed, and lastly (d) in cases of fraud rests will be made.

The Court in England is further in the habit of modifying the charge against the accounting party, according to the various degrees of culpability, by charging different rates of interests. In simple cases of neglect 4 per cent. is the usual rate, while if the neglect amount to a breach of trust, or be accompanied with misconduct, 5 per cent. is imposed. In this Province no such practice prevails, and when interest is calculated it is the usual legal rate—6 per cent.—whether the account be taken with rests or not. These different rates in England require to be continually borne in mind when reading the cases on the subject, as will be observed by the frequent reference to them in the cases cited below.

(a) *In cases of neglect merely of a legal duty, simple interest is charged.*

If an executor keeps money in his hands without any necessity from the circumstances of the estate or fund, he will be charged with interest, but usually, in England, only at 4 per cent. unless it appears that more might have been made of it, and then he will be charged with what might have been made. *Forbes v. Ross*, 2 Cox. 116. In that case the trustees were authorized to lay out the fund in lands or on personal securities at such rate of interest as they should deem reasonable. They exercised this authority by lending to one of themselves, the security was ample, and the borrowing trustee used the money by lending at 5 per cent., but claimed that from losses in loans he did not realize more than 4 per cent., but the trustees admitted that five per cent. might have been made by investing in government securities or on mortgages, and Lord Thurlow charged them 5 per cent.

In *Rocke v. Hart*, 11 Ves. 58; where it only appeared that the executor had not brought the money into Court, as he ought to have done, but it was not shewn that he had derived any benefit from it, Sir W. Grant charged him with simple interest at 4 per cent.

The rule is stated in the same way by Lord Eldon in *Mosley v. Ward*, 11 Ves. 581. "The Court does not usually give more than four per cent. where the money has been called in for the purposes of the will and the balance only has been in his hands."

Sir Thomas Plumer, V. C., in *Tebbs v. Carpenter*, 1 Mad 290, says "a distinction has been taken, as in every moral point of view there ought to be, between negligence and corruption in executors. A special case is necessary to induce the Court to charge executors with more than four per cent. upon the balance in their hands. If the executor has balances which he ought to have laid out, either in compliance with the express directions of the will, or from his general duty, even where the will is silent on the subject, yet if there be nothing more proved in either case, the omission to lay out amounts only to a case of negligence, and not of misfeasance." This statement of the rule as it respects non-compliance with the express directions of the will, has not been approved by later judges, but as to the effect of non-compliance with the general duty of the executor it is correct.

And Sir J. Romilly, M. R., in *Jones v. Foxall*, 15 Beav. 392, states the general rule thus; "If an executor has retained balances in his hands which he ought to have invested, the Court will charge him with simple interest at 4 per cent. on the balances; if in addition to such retention he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment in which it was producing five per cent. he will be charged with interest after the rate of 5 per cent.

(b) *If the instrument creating the trust direct an accumulation or investment or application of the fund, the neglect to comply with it will be considered a positive breach of trust and rests ordered.*

In *Raphael v. Boehm*, 11 Ves. 92, a testator gave to his executors a legacy to be in full for their trouble in performing the duties of his will, and directed that they were not to derive any advantage from keeping money in their hands, and that the surplus of his estate should be accumulated for the benefit of legatees. At his death more than £30,000 came to the hands of the executors, which for 13 years they retained. Lord Loughborough charged them 5 per cent. from the time of receiving the moneys, commencing at the death of the testator, and half-yearly rests. The Master in taking the accounts under this decree, computed interest upon each receipt from the day it was received, the balance of receipts, with interest so calculated, and payments being struck at the end of each half-year; and that balance so composed of principal and interest being carried forward as an item in the account, producing interest. Lord Eldon thought the decree unusually severe, but under the facts of the case would not refuse to give it effect. He says, (p. 107) "Where there is an express trust to make improvement of the money, if he will not honestly endeavour to improve it, there is nothing wrong in considering him, as the principal, to have lent money to himself upon the same terms, upon which he could have lent it to others, and as often as he ought to have lent it, if it be principal; and as often as he ought to have received it, and lent it to others, if the demand be interest, and interest upon interest. The Court would shamefully desert its duty to infants by adopting a rule, that an executor might keep money in his hands without being accountable as if he had accumulated."

In *Knott v. Coltee*, 16 Beav. 77, the executor was directed to invest in British stock or upon real security, and accumulate the surplus after maintaining infants. He invested in foreign funds,—and was charged 4 per cent. with annual rests. The M. R. saying, (p. 79) "The case must either be treated as if these investments had not been made, or had been made for his own benefit out of his own moneys, and that he had at the same time retained moneys of the testator in his hands. The usual course is to charge an executor with 4 per cent. where he has simply retained balances; but where he has acted improperly or has employed the trust money in trade for his own benefit, or has been guilty of other acts of misconduct, the Court visits him with interest at 5 per cent. In this case there does

not appear to me to have been any such misconduct as to make him answerable at 5 per cent. It appears simply a case in which an executor has retained moneys which he has not properly invested."

In *Jones v. Foxall*, 15 Beav. 388, there was a trust to call in a sum of money and invest in government or real securities. The trustee permitted the fund to remain in the hands of a trading firm, of which he was a member, for 16 years, and he was charged 5 per cent. with annual rents. Here was not only a positive breach of trust in neglecting to comply with the directions of the will, but also the employment of the funds for his own benefit.

In *Townend v. Townend*, 1 Giff. 201, the same principle was acted on by V. C. Stuart, and he gave compound interest at 5 per cent., on an infant's legacy which the executors had not invested properly pursuant to the directions of the will. See also *Wilson v. Peake*, 3 Jur. N. S. 155.

Considerable discussion has taken place as to the propriety of the rule by which these varying rates of interest are charged. The additional rates are sometimes said to be imposed by way of penalty, irrespective of the fact whether they have been received or not,—to this it has been replied, why not impose an additional sum of principal which has not been received as well as interest which has not been received. And it is said that the Court ought to charge the executor only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it; and acting upon such reasoning, Lord Cranworth, in *Attorney-General v. Alford*, 4 D. M. & G. 843, charged an executor with 4 per cent. simple interest only although he had neglected to apply the fund as directed by the will. It appearing that the executor had not in fact derived a benefit from the money, although grossly neglecting his duty. But this case cannot be considered as laying down a general rule of that kind, for although the decree of the Vice-Chancellor was varied by the Chancellor from 5 per cent. with annual rests to 4 per cent. simple interest, yet the defendant was ordered to pay the costs, although not so charged by the decree, nor was the decree appealed from on that ground. And in the *Mayor, &c., of Berwick v. Murray*, 7 D. M. & G. 519, the same Chancellor disclaims having intended to declare in *Attorney-General v. Alford*, that defaulting trustees should in no case be charged more than 4 per cent., and there charged the defendant 5 per cent.

- (c) *If the trustee has employed the trust funds in trade, or for his own benefit, whether there be a direction for accumulation, or investment, or not, the cestui que trust has the option of taking interest and rests, or the profits of the employment of the fund.*

Where a trustee employs trust funds in trade, he renders himself liable to be charged with ordinary trade interest. It will be presumed that his

accounts have been taken in the ordinary way in which commercial accounts are taken, viz., 5 per cent. interest, made up annually, and therefore with rests, *Penny v. Avison*, 3 Jur. N. S. 62.

In *Williams v. Powell*, 15 Beav. 461, the executor had engaged in trade and mixed the trust fund with his own money at his bankers, and he was charged 5 per cent. compound interest. And in *Heighington v. Grant*, 1 Ph. 600, n. where the executor had employed the trust money in his business as banker and shopkeeper, he was made to account with 5 per cent. compound interest.

Many decrees have no doubt been made formerly under such circumstances charging only simple interest, but the cases above cited, it is believed, indicate the practice of the Court at present. Thus in *Heathcote v. Hulme*, 1 J. & W. 122, simple interest only, seems to have been charged. In *Walker v. Woodward*, 1 Russ. 107, compound interest at 5 per cent. was given, but the order there is said to have been obtained by surprise, per Mr. Sugden in *Attorney-General v. Solley*, 2 Sim. 518, and in the last cited case simple interest only was given.

But besides the right of the *cestui que trust* to interest with rests in these cases, he has also the option of taking the profits realized from the employment of the fund, instead of interest, and this is an option he may properly enough insist upon before the Master, under an ordinary decree, and the very extensive language of this order. If he be entitled to rests, he would seem entitled to take the substitute for them.

Docker v. Somes, 2 M. & K. 655, is the leading case upon this subject, and the judgment of Lord Brougham contains an admirable exposition of the principles on which it rests. The right may arise either upon the ground of ownership, or of breach of trust; it is placed on this latter ground chiefly by Lord Brougham, "When a trustee or executor has used the fund committed to his care in stock speculations, though the loss if any must fall upon himself, yet for every farthing of profit he may make, he shall be accountable to the trust estate. So it is also, where one not expressly a trustee, has bought or trafficked with another's money, the law raises a trust by implication, clothing him though a stranger, with the fiduciary character, for the purpose of making him accountable." And, were it not for the inconvenience attending the working of such a decree, it would seem the most reasonable way of taking the account. Fixing a specific rate of interest, in lieu of profits, is obviously only guess work; all estates, in that way, must benefit equally, though the profit and the risk may be infinitely varied.

In *Palmer v. Mitchell*, 2 M. & K. 672, Sir W. Grant decreed an account of profits arising from the employment of the funds in trade, and in *McDonald v. Richardson*, 1 Giff. 81, a like decree was made. V. C. Stuart, stating the rule to be, that where an executor employs assets in carrying on a trade without authority, he is bound to account for, and pay over

all the profits, or he may be charged with interest at the option of those beneficially entitled.

In the simple case of an employment of trust funds in a separate and distinct trade or adventure, there cannot be much difficulty in ascertaining the profits, but when the executor or trustee employs them in his own business, mixing them with his own money, or in a partnership of which he is a member, the question becomes much more complicated.

There is no general rule, by which the proportion of the profits, that the owners of the fund are entitled to, can be ascertained; each case must depend upon its own circumstances.

In *Crawshaw v. Collins*, 15 Ves. 218; 1 J. & W. 267; 2 Russ. 325, a partnership had been dissolved by the bankruptcy of one partner, who was entitled to 3-8ths of the capital and profits of the business, and his assignees were held to be entitled to a like share of the profits of the continuation of the business after the bankruptcy, and of the money to be produced by the sale of what remained in specie of the capital and stock, and it was also held, in that case, that the assignees' share of the profits was not to be lessened, in respect of a debt which bankrupt owed to the partnership. But Lord Eldon (2 Russ. 344) guards himself from laying down a rule to apply to all cases. He says, "After a very anxious consideration of this subject, I believe that it will be found, that the rule which is to be applied must be deduced in almost every case, from the particular circumstances of that very case."

Another leading case upon this subject is *Willett v. Blanford*, 1 Hare, 253; Willett & Blanford carried on the business of picture frame makers, Willett being entitled to 7-10ths of the profits and Blanford to 3-10ths. They afterwards carried on another business in which they shared the profits equally. Willett died and appointed Blanford one of his executors, who carried on the business without withdrawing from the concern the share of Willett. On a bill filed by legatees of Willett, seeking to make Blanford account for the profits in the same proportion as they had been divisible during the life of the two partners, V. C. Wigram says, "I decided, at the conclusion of the argument, that the surviving partner, one of the executors of the testator, having carried on the partnership trades without withdrawing therefrom the testator's property, was liable in equity to account to his estate for some portion of the profits made in each of these trades since the testator's death. It was strongly urged upon me that I ought at once to declare that the testator's estate was entitled to 7-10ths of the profits made since his death, in the trade of picture-frame maker, and to a moiety of the profits of the other trade. I am of opinion that there is no rule of this Court applicable alike to all cases, and that there is no rule, which is so established or general in its application, that it is to be taken to be the general rule until circumstances are shown which displace it. The facts of each case must be fully brought under the view of the Court before it can be in a position to

state what justice to the party seeking its protection may require, with due regard to the interests of other parties. The circumstances of some cases would almost exclude the possibility of making a decree in any other form than that which the plaintiffs claim in this case. Take for example the case suggested by Lord Eldon, in *Crawshaw v. Collins*, of the mere conversion into money at a large profit, long after the testator's death, of the very property which belonged to the partnership at his death, and no other circumstance to embarrass the question. Again, the dissolution of a partnership *prima facie* prevents new contracts being made on the joint account of the partners, but it necessarily leaves the old contracts of the partnership to be wound up. In the absence of circumstances to alter the case, it would be impossible to deny the right of the estate of a deceased partner to participate in the profits arising from winding up the old concerns; and if, in such a case, the surviving partners should have so mixed up new dealings with the old, that the two could not be separated, the right of the estate of the deceased partner to share in the profits of the new dealings might unavoidably attach. Again the whole or the substantial part, of a trade may consist in good will leading to renewals of contracts with old connexions. In such a case, it is the identical source of profit which operates both before and after dissolution; and this appears to me to be the ground-work of Lord Eldon's reasoning in *Cook v. Collingridge*. Circumstances may be suggested of a very different kind. Take the case of a business in which profit is made by the personal activity and attention with which the use of the money capital is directed, and the case may require a different determination. Or there may be the case of two persons being partners together in equal shares; one finding capital alone, and the other finding skill alone, and suppose the latter, before his skill had established a connexion or good will for the concern, should die, and the survivor, by the assistance of other agents, should carry on the concern upon the partnership premises, it could scarcely be contended after a lapse of years, that the estate of the deceased partner was entitled as of course to a moiety of the profits made during that lapse of time after his death; and if his estate would not be so entitled where the deceased partner had left no capital, it would be difficult to establish a right to a moiety, only because he had some small share of the capital and stock in trade engaged in the business at his death, without reference to its amount and the circumstances of the case." V. C. Wigram considered himself "bound by authority and reason to hold that the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner, at the time of his death, and the conduct of parties after his death, may materially affect the rights of the parties."

In *Simpson v. Chapman*, 4 D. M. & G. 151, a testator was a member of a partnership at will in a bank, without any provision entitling the executor of a deceased partner to an interest in the good will of the con-

cern. The credit in which the bank was, rendered capital unnecessary and at the testator's death the property of the concern exceeded its liabilities by a very small amount, the testator's share in which was far exceeded by the balance due from him to the bank on his private account as a customer. After his death the surviving partners admitted into the firm his son, who was his executor, but who was not admitted into the firm in that character, and the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. In a suit against the executor, for the administration of the testator's estate, it was held that he was not accountable for the profits which he had received as a partner in the bank.

Lord Justice Turner expressed his entire concurrence in the opinion expressed by V. C. Wigram in *Willett v. Blanford*.

Wedderburn v. Wedderburn, 22 Beav. 84, is one of the most recent cases in which this subject has been discussed.—Sir J. Romilly, M. R., acted upon the principles enunciated in *Willett v. Blanford*, and *Simpson v. Chapman*, and finding that, at the testator's death, the surplus was merely nominal, that the business to wind up was insolvent, and that the subsequent profits were attributable to good will, (which by agreement belonged to the survivors,) and the personal exertions and capital of the surviving partners, refused to give the representatives of the deceased a participation in the profits, as far as those profits were attributable to the good will and connexion in trade of the old firm, and that their share in that portion of the profits in which they would be entitled to participate could not be estimated higher than the interest which had been paid.

Where an infant *cestui que trust* is interested, an enquiry will be made whether it is for his advantage to take interest or profits, *Burden v. Burden*, cited in *Heathcote v. Hulme*, 1 J. & W. 122. And this enquiry would seem to be within the province of the Master under an ordinary decree.

(d) *In cases of fraud rests will be made.*

Only one case need be referred to, if so much be necessary, to show that a person, who has fraudulently retained money in his hands, must account for it with compound interest.

Stacpoole v. Stacpoole, 4 Dow, 209, administration was taken out in 1771, distribution to a certain extent made, but a large sum retained on unfounded pretences. No effectual suit against the administrator till 1792, and that protracted, in a great measure, by the administrator's fault, in the Court below till 1810. It was held by the House of Lords reversing, in that respect, decrees of the Irish Chancery, that, notwithstanding the lapse of twenty years before effectual suit for account commenced, the administrator ought to be charged with the full legal interest on the sum remaining undistributed, during the whole period of retention; and that the account should be taken with annual rests, and the interest be charged on the annual balances.

(2). *As to rests in accounts against mortgagees in possession.*

In this case where the receipts of the mortgagee are more than sufficient to cover the interest, the annual surplus will be considered as applicable, in reduction of the principal money, which is called taking the account with rests, *Fisher on Mortgages*, 894; applying the surplus in reduction of the principal bearing interest, is obviously equivalent to calculating interest on the surplus.

Accounts cannot be taken in this manner, in England, without an express direction in the decree, and a decree to that effect can only be made upon allegations in the pleadings, *Webber v. Hunt*, 1 Madd. 18; *Nelson v. Clarkson*, 4 Hare, 97. The section of the order now under consideration, however, authorizes the Master to make the rests without a direction in the decree and without a case being made upon the pleadings to justify them.

The principle upon which rests are made against mortgagees, is that he is not bound to receive payment of his debt in dribblets, but he has the right to do so if he thinks fit. If he enters into possession when no arrear of interest is due, he evidences his intention so to receive payment of the debt, and the account therefore goes with rests; but if the interest is in arrear when he enters into possession, the fact of his taking possession affords no evidence of his intention to receive payment by dribblets, as he is driven to take the possession by the non-payment of the interest, and the account therefore goes on till the whole debt has been satisfied. Per Lord Justice Turner in *Nelson v. Booth*, 3 D. & J. 119.

If the interest be in arrear when possession is taken, rests are not made, *Davis v. May*, 19 Ves. 384; *Coop.* 238; *Wilson v. Cluer*, 3 Beav. 136; *Coldwell v. Hall*, 9 Grant, 110; and if not liable to account with rests when the possession is taken, the mortgagee does not become so liable until the whole of the mortgage debt has been paid off, *Wilson v. Cluer*; *Davis v. May*, *supra*. He does not become so liable merely by the interest and arrears being paid, *Finch v. Brown*, 3 Beav. 70; *Latter v. Dashwood*, 6 Sim. 462.

Where the mortgagor had, before the mortgagees entered into possession, indorsed to them bills of exchange for the arrears of interest; the bills fell due after the possession was taken and were dishonored, and it was held that the interest was in arrear when possession was taken, so as to preclude the mortgagor from claiming to have the accounts taken with rests, *Dobson v. Land*, 4 DeG. & S. 575.

If the mortgagee in the exercise of his legal right choose to go into possession, when there is no interest in arrear, he must account with rests, *Robinson v. Cumming*, 2 Atk. 410; *Nelson v. Booth*, *supra*, unless he have been driven, by the acts of others, to take possession, and his own conduct has been free from harshness or oppression, *Horlock v. Smith*, 1 Coll. 287. When a mortgagor stated an account with the mortgagee in possession,

by which it appeared either that no interest was due, or than any which was due was satisfied as interest, by being converted into principal, and the mortgagee continued in the receipt of rents of amount more than sufficient to satisfy the interest of such principal; the settlement was continued as a rest made by the parties themselves, and that the mortgagee retaining the possession with no interest due to him, was to be dealt with as a mortgagee who takes possession without interest being in arrear, *Wilson v. Cluer*, 3 Beav. 186.

Rests will also be made where the title of the mortgagor is denied. For when a creditor denies his character as such, and claims as owner, he will not be allowed to fall back on his original character of creditor, as if he had never departed from it, *Incorporated Society, &c., v. Richards*, 1 Dr. & W. 258, 334. In *Aitchison v. Coombes*, 6 Grant, 643, where the defendant claimed to be a purchaser for value without notice, which was disproved, the decree, unnecessarily perhaps, directed the account to be taken with rests; this point is not noticed in the report. In like manner in *Montgomery v. Calland*, 14 Sim. 79, the plaintiff sought to redeem against a mortgagee in possession, who by his answer set up an unfounded claim to the equity of redemption, and denied that the mortgage had been satisfied, although a balance was due from him when he filed his answer, the mortgagee was ordered to pay interest on the balances in his hands since the time when the mortgage was satisfied, besides portions of the costs.

Although the mortgagee when he took possession may not have been liable to rests, yet when, by the receipt of rents or otherwise, the whole debt became satisfied, rests will be made from that time, *Wilson v. Metcalfe*, 1 Russ. 530; *Lloyd v. Jones*, 12 Sim. 490; in this last case the mortgagee was paid by the receipt of rents and profits pending the proceedings in the Master's office under a decree to redeem.

When the mortgagee is himself in the occupation of the premises, and is charged with an occupation rent more than sufficient to pay the interest, he will be charged with rests, if possession were taken when no interest in arrear, or if he is paid off by means of the occupation rent, *Wilson v. Metcalfe*, 1 Russ. 530; *Binnington v. Harwood*, T. & R. 477. If a mortgagee, receiving the rents of the mortgaged estate, after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money and ought to be charged with interest. Is his situation substantially different when he is in the actual occupation of the mortgaged premises? Though he is not in receipt of rent, he is in fact in receipt of profits; and these he keeps in his pocket. Per *Lord Gifford*, M. R. 1 Russ. 535.

There seems to be some doubt as to the proper mode of making the rests when sums have been received between the dates of the rests. In *Binnington v. Harwood*, *supra*, sums so received were applied, when they

exceeded the interest, to sink the principal. Mr. Fisher in his work on mortgages, appears to think that this depended on the usury laws, and that since their repeal the rests would not be so made unless for special reasons. Sir Thomas Plumer does not place the decision upon that ground, and it would appear to be only in conformity with plain justice, that the rests should be made whenever the receipts exceeded the interest. But whatever may be the technical mode of working a decree ordering annual rests, it is apprehended that the Master under this order is fettered by no such difficulty, and that the true mode of taking the account is to treat the time of every payment, which exceeds the interest, as the period for making the rest.

II. THE NEXT AUTHORITY IN ORDER BY THIS SECTION CONFERRED UPON THE MASTER IS "TO TAKE ACCOUNT OF RENTS AND PROFITS RECEIVED, OR WHICH, BUT FOR WILFUL NEGLIGENCE OR DEFAULT, MIGHT HAVE BEEN RECEIVED."

It is obvious that this authority is in terms confined to accounts against persons in the possession or occupation of real estate.

The cases which most frequently occur for considering the subject of liability for wilful default, are those of mortgagees, trustees, and wrong doers.

In the case of a mortgagee in possession, it is a matter of course to charge him with rents and profits received, or which but for his wilful default might have been received. A mortgagee when he enters, enters under a condition, imposed on him by the Court, of exercising the utmost diligence for himself and the mortgagor, *Sherwin v. Shakespear*, 5 D. M. & G. 531, 536. A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and the estate being in the eye of the Court a security only for the money, the Court requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who in the view of the Court is entitled to it; it is part of his contract that he should do so, per L. J. Turner, in *Kensington v. Bouverie*, 7 D. M. & G. 157.

The acts which amount to wilful default, to charge a mortgagee, must be either fraudulent, or grossly negligent. Actual fraud is not necessary. It is sufficient, if there is plain, obvious, and gross negligence, by not making use of facts within his knowledge; so as to give the mortgagor the full benefit, that the mortgagee in possession of the estate of the mortgagor ought to give him. If, for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was underlet, takes a new tenant; another person offering more; an offer, however, not to be rashly accepted. Per Lord Erskine, in *Hughes v. Williams*, 12 Ves. 493.

The true doctrine of the Court is, that a mortgagee in possession of the mortgagor's property, is bound to use it as carefully as if it was his own

Per V. C. Stuart, in *Cocks v. Gray*, 1 Giff. 77. But he is not required to do more, and therefore in the last case, where the defendant was mortgagee in possession of a livery stable, which he rented to a tenant from year to year, and the rent being in arrear, he distrained several carriages and horses, belonging to different noblemen and gentlemen, which were standing at livery. But, upon receiving notice from the owners that, unless they were restored to their owners, proceedings would be taken against him, he gave them up, and it was held that he was not chargeable for wilful default, in declining to defend an action of replevin. That the mortgagee was not bound to distrain, and that having distrained the property of third persons upon the premises, he acted prudently in declining to embark in the litigation; that the Courts of law gladly caught at any distinction to escape from the harsh rule of law, which permits landlords to seize the property of other persons found on their premises.

This decision apparently rests on the doubtfulness of the right to distrain horses and carriages standing at livery, and the apprehension that the mortgagee might have had a verdict against him. For if the right were perfectly clear, it is difficult to understand why the mortgagee should not have accounted for them, yet the right to distrain, in such cases, seems to have been expressly sanctioned in *Parsons v. Gingell*, 4 O. B. 545.

No account of past rents will be taken against a mortgagor in possession, at the instance of a mortgagee, *ex parte Wilson*, 2 V. & B. 252; and if a first mortgagee be in possession, without notice from the second mortgagee, he may pay the rents over to the mortgagor; and the second mortgagee, if he is so imprudent as not to give that notice, as he cannot have an account of the by-gone rents from the mortgagor, so he cannot have it from the other mortgagee. Per Lord E'don, *Berney v. Sewell*, 1 J. & W. 650.

Trustees, whether express or constructive, are not, like mortgagees in possession, liable to account, as of course, for wilful default,—a special case of fraud, misconduct, or gross negligence, requires to be established against them.

"In the case of vendor and purchaser, as by the contract the vendor becomes trustee of the estate for the purchaser, if the vendor remain in possession during the interval when the title is in dispute, he will, like other trustees, be liable to account for the rents and profits, and upon a proper case, be charged with wilful default. The vendor may call for interest upon his purchase money, although the vendor has suffered it to lie dead. Then, to pursue that principle, must not the vendor, the legal owner of the estate, by a parity of reasoning, take care of the purchased estate? He must. If he has received rent, he must account for it; if he has suffered tenants to run in arrear, he is responsible for the loss thereby occasioned. If possession of the estate was given, or any tender of possession was made, or the purchaser exercised acts of ownership over the

premises, that may make a difference." Per V. C. Plumer, *Acland v. Gaisford*, 2 Madd. 28.

In *Wilson v. Clapham*, 1 J & W. 36, a decree for specific performance had been made with a direction for the vendor to account for rents and profits; and a motion was made to vary the minutes so as to charge him further with what but for his wilful default he might have received, upon a suggestion that they had been suffered to run in arrear. And Sir Thomas Plumer, then M. R., directed enquiries to ascertain if the vendor had been in default, observing, "The care of the estate must of necessity belong to the vendor," the title being such that it was not safe, before the decree, for the purchaser to take possession, he becomes trustee for the purchaser, and what hardship is there in expecting him to take the same care of it as he would if it were his own? He must take the measures that are adopted by every prudent landlord. If ultimately the estate is determined to continue his own, he retains the rents; if not, he hands them over to the vendee.

Where the purchaser refuses to take possession when he might and ought to have done so, he cannot make the vendor answerable for remaining in the possession of the premises, *Dakin v. Cope*, 2 Russ. 170.

L. J. Knight Bruce observed, in *Sherwin v. Shakspear*, 5 D. M. & G. 517, 531, "My impression from the course of the Court (as far as I have been acquainted with it) and upon principle, is, that a special case ought to be made for the purpose of inserting those words (charging wilful default) in a decree for specific performance; where the vendor has been in possession during a time, in which he is to account for the rents," and L. J. Turner observes in the same case, p. 536, "There is a vast distinction between the position of a vendor and that of a mortgagee who enters into possession of the estate,—in the case of a vendor, the vendor does not take but remains in the possession of the estate. It may ultimately appear that the estate of which he is in possession may never become the estate of the purchaser at all, and I think that if he continues in the due and ordinary course of management, it is not the course of this Court to charge him, upon the principle of his having been converted into the position of a mortgagor for the purchase money."

In the case of *Martin v. Norman*, 2 Hare, 596, on a bill by the vendor for specific performance, the decree charges the plaintiff with the rents received, or which, but for his wilful default, he might have received. The facts are not given at much length, and this point does not seem to have been argued, as the report is confined to a discussion on the effect of a "traversing note," but so far as the report does go, there seems no ground for a decree of this nature, and it cannot be considered as an authority, in opposition to the cases cited above.

In those cases in which a purchaser for value is evicted by a better title, of which he had notice, he is considered as a trustee for the true

owner, and is not, in the absence of special circumstances, chargeable for wilful default, *Howell v. Howell*, 2 M. & C. 478.

In that class of cases where deeds or contracts have been obtained by fraud or misrepresentation, and possession taken under them, the same rule applies, although the reason for it may not be apparent. Perhaps it may be on the ground that the person in possession assumed to be owner, but will, in the absence of evidence to the contrary, be considered as dealing with the estate, as a provident owner would.

Whatever may be the reason, the authorities are numerous, that he cannot be charged in this stringent mode without a special case, *Murray v. Palmer*, 2 Sch. & L. 474; where a conveyance obtained from a woman in ignorance of her rights, and upon misrepresentation of the circumstances of the property, was set aside; but Lord Redesdale refused to charge him with what, but for wilful default, he might have made, *Masters v. Braban*, Seton (2nd Ed.) 307; where Braban got into possession and claimed under a forged declaration of trust, yet was only charged with rents and profits received, *Trevelyan v. Charter*, 4 L. J. N. S. 209; 11 Cl. & Fin. 714; 9 Beav. 140; where a purchase by a solicitor was set aside, the decree only directed him to account for rents received, *Seton* (2nd Ed.) 302; *Nevills v. Nevills*, 6 Grant, 121; a conveyance fraudulently obtained by a son from his father was set aside, but the decree only ordered the son to account for rents received.

The executor of a person who has obtained and held possession, under an erroneous idea of title, is liable to account to the true owner, for the rents and profits during the testator's possession, *Monypenny v. Bristow*, 2 R. & M. 117.

A testamentary guardian, *Mathew v. Brise*, 14 Beav. 341; and a statutory guardian, *Duke of Beaufort v. Berty*, 1 P. Wms. 704, are trustees and must account in the ordinary way, and will not be liable for wilful default except upon a special case.

As to mere wrong-doers there are not many cases in which they are liable at all to a suit in Equity, the remedy against them being a legal one, but when a person enters upon an infant's estate he is treated in Equity as his bailiff, *Newburgh v. Bickerstaffe*, 1 Vern. 295; *Bloomfield v. Eyre*, 8 Beav. 250; *Hicks v. Sallitt*, 3 D. M. & G. 782; and it is apprehended that the decree in such a case is only for the ordinary accounts.

But to entitle the infant to an account he must have been in possession by himself, his guardian, or agent, *Crowther v. Crowther*, 23 Beav. 305.

As to the time for which an account of rents may be had, it is to be noticed, that prior to this order, if the Statute of Limitations were intended to be insisted on as a bar to the account, it required to be set up in the pleadings; but now the whole contest is transferred to the Master's office.

The 22 *Vic. c. 88, s. 19*; *Con. Stat. U. C. p. 873*; the same as the *Imp. Act, 3 & 4 W. 4, c. 27, s. 42*; enacts that no arrears of rent or of interest in respect of any money charged upon, or payable out of any land or rent, &c., shall be recovered by any action or suit but within six years next after the same shall have become due, or after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same is payable, or his agent.

The statute, however, does not apply to cases of express trusts, until the lands or rent shall have been conveyed to a purchaser for value, nor in cases of concealed fraud, *Con. Stat. U. C. p. 876, s. 32, 33*; *Imp. Stat. s. 25, 26*.

In case of disability, ten years are allowed next after the cesser of it, *Con. Stat. U. C. p. 879, s. 45*; *Imp. Stat. s. 16*.

These provisions are considerably modified by the Dormant Equities Act, *Con. Stat. U. C. p. 58, ss. 59, 60*; which enact that no title valid at law shall be disturbed or affected in Equity by anything which arose before the 4th of March, 1837, unless in the case of actual and positive fraud in the party whose title is sought to be disturbed,—and in regard to any other claim which arose before that date, the Court shall make such decree as may appear just and reasonable if the suit be brought within 20 years from the accrual of the right, and no further time shall be allowed for disability. This act has been held to apply to cases of express trust, *Beckett v. Wragg*, 7 Grant, 220; *Attorney-General v. Gra-sett*, 8 Grant, 130; but see *Tiffany v. Thompson*, 9 Grant, 244.

Where an infant six years after attaining his majority seeks an account against his guardian for arrears of rent, it was at one time held that he was barred by the statute 21 J. 1, c. 16, s. 3; *Lockey v. Lockey*, *Pre. in Chy.* 518; but in *Mathew v. Brise*, 14 Beav. 341, it was held otherwise, and in *Hicks v. Sallitt*, 3 D. M. & G. 782, where the claim was made against a purchaser for value with notice, it was held that a suit for such an account was not within the 42nd sec. of the *Imp. Act (19 Sec. Prov. Act, supra)* and an account was decreed for the whole period of the wrongful possession, and see *Grant v. Ellis*, 9 M. & W. 113.

III. THE NEXT SUBJECT IN THIS SECTION UPON WHICH THE MASTERS ARE AUTHORIZED TO ADJUDICATE, IS THAT OF SETTING AN OCCUPATION RENT.

This is a sum to be fixed as an equivalent for having occupied lands, &c., in respect of which there is no subsisting agreement, or none binding upon the owner to pay a definite rent, and to which the occupant is not entitled for his own benefit, *Bennett's Prac.* 176. To charge a person with an occupation rent he must have been in the occupation of the property, and as it is equivalent to making him answerable as for wilful default, it is, under the practice in England, requisite to allege the occupation in the bill, and that a direction should be inserted in the decree

before the Master or Chief Clerk can so take the account. Mr. Bennett says, "There are few questions more contested where such an one arises before the Court as to the liability to be charged, and the contest is generally transferred to the Master's office as to the *quantum* of rent to be assessed." By this not very lucid sentence, he probably meant that the *quantum* of rent was usually the subject of great contest in the Master's office; for the liability to be so charged is not a question of much difficulty. The mere fact of occupation is all that is necessary to be proved in order to establish the liability of a mortgagee or trustee to be so charged.

The cases in which the subject of occupation rent usually arise are those of mortgagees or trustees, but is not confined to these, and it may be said generally that whenever a person is in the occupation of property to the possession of which another is entitled, the occupant may become liable to be charged with an occupation rent.

A mortgagee is charged with an occupation rent if he has been in the actual occupation of the mortgaged property, but an occupation of a part is not considered as occupation of the whole, and he will only be so charged as to the part he has occupied, and account for the rents and profits received, or which, without wilful default, he might have received, of the remainder, *Trulock v. Robey*, 15 Sim. 265; *York Buildings Co. v. McKenzie*, 8 Bro. P. C. 70.

A doweress is entitled to have an occupation rent charged against the heir in occupation, but only for six years before the filing of the bill, *Bamford v. Bamford*, 5 Hare, 203, 206.

A vendor in occupation under such circumstances as would have rendered him liable to an account of rents, &c., had he been merely in possession, will be so charged, but not if the purchaser might and ought to have taken possession, *Dalrymple v. Cope*, 2 Russ. 170.

Express trustees or constructive trustees in occupation of property acquired by fraudulent means, will be charged with an occupation rent, *Lamont v. Lamont*, 7 Grant, 265, 269; *Mill v. Hill*, 3 H. L. C. 828; *Ex parte James*, 8 V. & B. 351.

Where a person in occupation of property which he had conveyed absolutely to one member of the firm, but which he alleged to be only by way of security for a debt due to the firm, and after the institution of a suit between the partners, obtained leases from the partner having the legal estate, an occupation rent was ordered to be fixed, *Prentiss v. Brennan*, 2 Grant, 18.

In a suit for partition by one tenant in common against another, who had occupied the property, and excluded the plaintiff and denied his right, the defendant was charged with an occupation rent for (the plaintiff's share) one-third of the estate, *Pascoe v. Swan*, 27 Beav. 508.

The chief difficulty in such cases is to ascertain what amount should be assessed as the rent, and the evidence adduced requires to be very carefully scrutinized. Architects, surveyors, and house and land agents, it is well known, are very subject to a bias in favour of the person who calls them as witnesses. So much is this the case that it has been said, any value absurdly great, or as absurdly small, can be authenticated by their evidence, though upon oath. Farmers or persons in the neighbourhood not unfrequently have a leaning to the occupant, and tend to place as small a sum as possible as the value. The safest guide, no doubt, is the rental value, if that can be ascertained, from actual offers, or the testimony of disinterested witnesses. In many cases a view by the Master is of importance, although his conclusion cannot rest upon his inspection, yet it enables him to apply the evidence in a more satisfactory manner than he can possibly do from the mere description of the witnesses.

IV. THE MASTER IS FURTHER AUTHORIZED TO TAKE INTO ACCOUNT NECESSARY REPAIRS, AND LASTING IMPROVEMENTS, AND COSTS AND OTHER EXPENSES PROPERLY INCURRED OTHERWISE, OR CLAIMED TO BE SO.

Mortgagees in possession are allowed sums laid out by them in necessary repairs and lasting improvements, with interest on them at the same rate that the mortgage bears, *Hoare v. Newland*, Seton (2nd Ed.) 188; *Knowles v. Chapman*, *Ib.* 225, and see *Ib.* 200; *Quarrell v. Beckford*, 1 Mad. 273; *Webb v. Rorke*, 2 Sch. & L. 675. But if the improvements are not necessary to preserve, though they may increase the value of the estate, the costs of them will not be allowed, as it might tend to clog the right of redemption, *Sandon v. Hooper*, 6 Beav. 246; and in all such cases where the works may amount to lasting improvements, the mortgagee can scarcely be safe, without he get the consent or approval of the owners of the equity of redemption, *Sandon v. Hooper*, *supra*; *Trimleston v. Hamill*, 1 B. & B. 385; *Fisher*, 888; *Davey v. Durant*, 1 DeG. & J. 535, 554; *Constable v. Guest*, 6 Grant, 510.

Where a person agreed to purchase a leasehold supposing the seller to have an unincumbered title, and went into possession, and laid out large sums in improvements, but not having made enquiry for the title deeds, was fixed with constructive notice of a prior sub-lease by way of mortgage, which he was compelled to pay off, and the seller having conveyed the reversion to a third party, the purchaser was held not entitled to a specific performance, but declared entitled to hold the estate as against that third party, not only for the sum paid to the prior mortgagee, but also for the money paid to the seller, and for any sums properly laid out by him in permanent improvements in the character of a mortgagee; *V. C. Stuart* refusing to allow for all sums laid out in improvements made under the impression that he was owner, *Hipkins v. Amery*, 6 Jur. N. S. 1047, 1061.

Money paid by mortgagees in possession for taxes, for a renewal o

leases for head rent, or in supporting the mortgagor's title to the estate, or to make their title good against the mortgagor at law or in equity, or in taking out administration to the mortgagor to secure himself in case he were defeated at law, will be allowed, *Fisher*, 883, and cases there cited.

But by *Ord.* 465, a mortgagee who has proceeded at law shall not be entitled to his costs in equity, unless the Court, under the circumstances, shall see fit to order otherwise. Under this order the Master has no discretion. If the decree direct the costs in equity to be taxed he must do so although it should appear for the first time in the progress of the suit, before him, that proceedings had been taken at law.

If a mortgagor seek to deprive the mortgagee of his costs in equity, it would therefore seem that the facts should appear upon the pleadings, and a direction to that effect made in the decree, for it is apprehended it would be too late to seek it on further directions.

In a case, however, where upon a bill being filed by a junior mortgagee for redemption and foreclosure, the elder mortgagee discontinues proceedings in a suit for foreclosure, the Master would seem to be authorized to tax him his costs of his own suit and add it to his debt, *Lomar v. Hide*, 2 Vern. 185.

But money paid for insuring the mortgaged property, in the absence of any covenant for that purpose in the deed, will not be allowed. The mortgagee is entitled to the benefit of the insurance money, and not being liable to account to the mortgagor for it, he cannot charge him with the premiums, *Dobson v. Land*, 8 Hare, 216; 4 DeG. & S. 575; *Russell v. Robertson*, 1 Cham. R. 72.

A mortgagee in possession is so far a trustee that he will not be allowed to make any profit whatever out of the estate, e. g. allowances for management, or commission on consignments, *Leith v. Irvine*, 1 M. & K. 277; and if he have a power of sale he cannot, nor can a partnership of which he may be a member, have a commission for conducting the sale professionally, *Matheson v. Clarke*, 3 Drew. 3.

In regard to trustees who have attempted to purchase the trust estate, or quasi trustees, by reason of acquiring a title defeasible by reason of fraud, &c, they will be allowed sums expended in permanent and lasting improvements or such as have a tendency to bring the estate to a better sale; as in one case for a mansion house erected, plantations of shrubs, &c, *York Buildings Co. v. McKenzie*, 8 Bro. P. C. 42; *ex parte Hughes*, 6 Ves. 617; *ex parte Bennett*, 10 Ves. 400; and this proceeds, not upon the principle, that the owner lying by and allowing improvements to be made ought not to be allowed to recover the estate without paying for them; but that when a trustee expends his money, and thereby increases the value of the estate, it would be inequitable to wrest it from him, without repaying the expenditure, by which the estate has been substantially improved; and he is therefore entitled to the improvements although the

true owner be an infant and incapable of consenting to or acquiescing in them, *Bevis v. Boulton*, 7 Grant, 39; *Mill v. Hill*, 3 H. L. C. 828.

In *Neville v. Nevills*, 6 Grant, 121, 139, although the defendant had fraudulently obtained title to the property he was allowed for improvements. And in *Pascos v. Swan*, 27 Beav. 508, the defendant denied the title of the plaintiff but was allowed for lasting improvements.

Under the general language of this section the Master no doubt has power to take into account "just allowances," which in England have recently been authorized to be taken without direction in the decree, *Eng. Com. Ord.* 23, r. 16. What are just allowances must depend upon the circumstances of each case, and have in some manner been anticipated by the remarks on what mortgagees and trustees are allowed in account although a trustee can make no benefit from the estate, yet he is entitled to be held harmless from expense and loss. When necessary the expense of a collector to receive rents, of bailiffs, surveyors, and accountants are allowed, and so are the necessary legal expenses of carrying the trust into effect, *Wilkinson v. Wilkinson*, 2 S. & S. 287; *Henderson v. McIver*, 3 Mad. 275; *Macnamara v. Jones*, 2 Dick. 587. A surviving partner continuing the business and employing the deceased's capital may be allowed under this head for his trouble in managing it; *Cooke v. Collingridge*, Jac. 623; *Brown v. DeTustet*, *Ibid*, 284.

And in an account of rents of estate received by superior title these were directed, *Howell v. Howell*, 2 M. & C. 478, see *Seton* (2nd ed.) 38.

V. FINALLY, THE MASTER IS AUTHORIZED "GENERALLY IN THE TAKING OF ACCOUNTS, TO ENQUIRE AND ADJUDGE AS TO ALL MATTERS RELATING THEREAT AS FULLY AS IF THE SAME HAD BEEN SPECIFICALLY REFERRED."

Down to a very recent period, a difference of opinion existed as to the construction of this clause. It was agreed that, jurisdiction being given to the Master by a previous clause of the order to take accounts of rents, &c., which but for wilful default might have been received, indicated an intention to confine his powers to cases of rents, &c., and not to apply them to accounts of personal profit; and that this intention was not to be controlled by the general words of the last clause. That a decree simply directing accounts to be taken, and a decree directing them to be taken with a wilful default clause, were two entirely distinct things. The first was obtained as a matter of course from an accounting party; while the latter could only be had on a bill charging specific instances of misconduct, and established by evidence. And that these general words in the last clause did not give the Master the power of converting one decree into the other, *Sleight v. Lawson*, 3 K. & J. 292; *Partington v. Reynolds*, 4 Drew, 258. And so strictly was this followed that where the original decree only directed the ordinary accounts, enquiries as to wilful default would not be granted on further directions, *Coops v. Carter*, 2 D. M. & G. 292. But in the case of *Carpenter v. Wood*, 10 Gr. 354, it has been held that these

general words authorize the Master, and make it his duty, to enquire as to wilful neglect or default in taking any accounts that may be referred to him.

From the large space devoted to this order, it will be inconvenient to pursue it further by an investigation of the cases in which an accounting party is chargeable in that stringent manner in his dealings with personal property. The cases cited with reference to his liability as to real estate, contain the principles upon which he is charged for misconduct, or improper dealings, and a little attention will readily enable the practitioner to apply them to any case that may occur.

In concluding these remarks upon this section it may be observed that the powers conferred on the Master do not exclude the right of the Court to make a decree on the subjects embraced in at the original hearing. In several of the cases cited, e. g., *Lamont v. Lamont*, *Bevis v. Boulton*, and *Aitchison v. Coombs*, the decrees contained special directions on these subjects.

221. Under an order of reference, witnesses may be examined before any Examiner of the Court; and foreign commissions for the examination of witnesses without the jurisdiction of the Court, may, on the certificate of the Master, be issued by the Clerk of Records and Writs upon precipe. (3rd June, 1853; Ord. 42, s. 14.)

A Master has jurisdiction to direct evidence to be used on an enquiry before him, to be taken before any other Master, though not consented to, *Re Casey*, 1 Cham. R. 198.

222. The Master may cause parties to be examined, and to produce books, papers and writings, as he thinks fit, and may determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or in case he does not deem it necessary that such books and papers or writings should be left or deposited in his office, he may give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner as he deems expedient. (3rd June, 1853; Ord. 42, s. 14.)

An order to produce documents involves an order to leave them, if the Master thinks fit so to direct, *Sidden v. Liddiard*, 1 Sim. 388; *Shirley v. Earl Ferrers*, 1 M. & C. 304.

The Court leaves it to the Master to decide whether the documents are to be produced from time to time, or to be deposited, *Henna v. Dunn*, 6 Mad. 340.

As to the Master's certificate of default, see *Harris v. DeTastet*, 1 S. & S. 263; *Askeu v. Peddle*, 10 Sim. 182.

Where the Master directed the production of all books, &c., connected with one of the subjects of the reference, and none of them being produced, a four day order obtained upon a certificate that the parties had been duly summoned to produce all books, &c., relating to the matters in question in this suit, was discharged, *Stubbs v. Molineux*, 4 Beav. 545.

After decree, a defendant can compel production by a co-defendant, *Hart v. Montefiore*, 10 W. R. 97.

As to form of Master's certificate of default, see *Sutherland v. Rogers*, 2 Cham. R. 191; *Bennett's Mas. Off.* app. 80.

223. The Master may cause advertisements for creditors, and if he thinks it necessary, but not otherwise, for heirs or next of kin, or other unascertained persons, and the representatives of such as are dead, to be published as the circumstances of the case require; and in such advertisements he is to appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded from the benefit of the decree. (3rd June, 1853; Ord. 42, s. 14.)

224. The Master is to proceed on the claims brought in before him pursuant to such advertisement, without further notice, and may examine witnesses in relation thereto at the time appointed in the advertisement, or thereafter, as he sees fit; and he is to allow or disallow, or adjourn the claims as to him seems just. (3rd June, 1853; Ord. 42, s. 11.)

In a creditor's suit the plaintiff must prove his claim in the Master's office, and each creditor may dispute the claims of the others, *Field v. Titmus*, 1 Sim. N. S. 218; *Owens v. Dickenson*, Cr. & Ph. 48.

Although the time had elapsed, creditors were allowed to come in so long as the fund was in Court, *Lashley v. Hogg*, 11 Ves. 602; after deficient assets apportioned among creditors, and transferred to the accountant-general for payment to them, another creditor allowed to come in on payment of consequent costs, *Angell v. Haddon*, 1 Madd. 529.

A creditor coming in after long delay every defence against his claim allowed as on a new bill, and undistributed part of the assets liable only proportionately, *Greig v. Somerville*, 1 R. & M. 338; creditor coming in after some legatees paid, and fund carried to account of the rest, entitled to a proportional part only of the latter, *Gilespie v. Alexander*, 3 Russ. 180.

Claim disallowed by chief clerk in one suit, is not barred in another, *Teed v. Beere*, 5 Jur. N. S. 381; 7 W. R. 394.

A claimant in an administration suit, may be cross-examined upon his affidavit in support of his claim, *Oasi v. Poyser*, 3 Jur. N. S. 38; 26 L. J. Ch. 353.

225. The costs of proving such claims are, in the discretion of the Master, to be allowed to the creditors proving the same, and added to their debts respectively, or to be disallowed. And in case of their being allowed, they may be allowed in gross in place of taxed costs. (3rd June, 1853; Ord. 42, s. 11.)

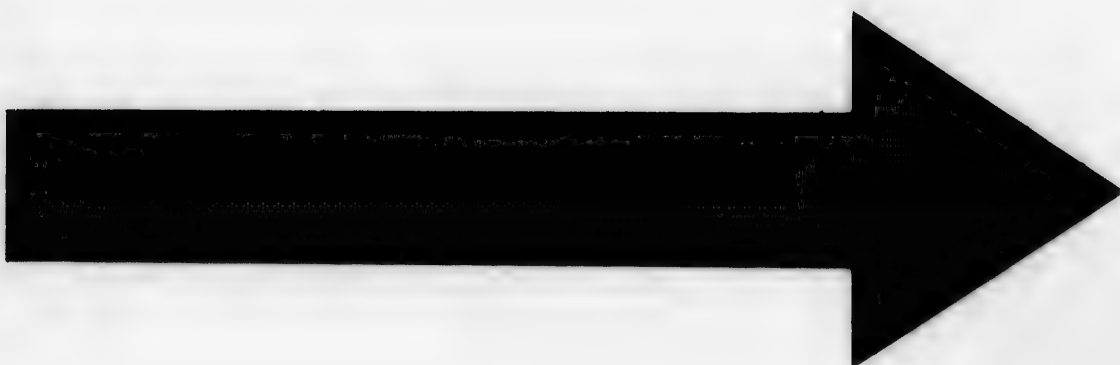
A creditor is entitled to the costs of establishing his debt; and the Court has jurisdiction to order payment of costs, by a creditor failing to prove his claim, *Hatch v. Searles*, 2 Sm. & G. 147; 2 W. R. 297; *Yeoman v. Haynes*, 24 Beav. 127; *Colyer v. Colyer*, 10 W. R. 748.

The power given to the Master to allow a gross sum in lieu of taxed costs, does not affect the costs of the creditor who is plaintiff in the suit, *Flintoff v. Haynes*, 4 Hare, 309.

Where the fund is insufficient the costs are added to the debts and with them apportioned, *Morshead v. Reynolds*, 21 Beav. 638.

226. Under every order whereby the delivery of deeds or execution of conveyances is directed, the Master is to give directions as to the delivery of such deeds, and to settle conveyances where the parties differ, and to give directions as to the parties to the conveyances, and as to the execution thereof. (3rd June, 1853; Ord. 42, s. 14.)

227. Where any account is to be taken, the accounting party is, unless the Master otherwise directs, to bring in the same in the form of debtor and creditor, verified by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be re-



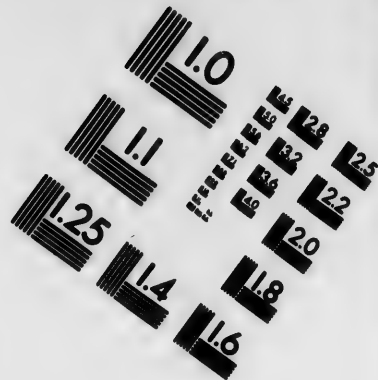
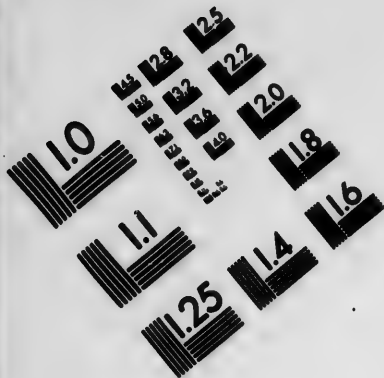
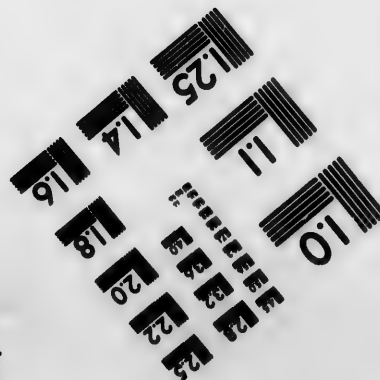
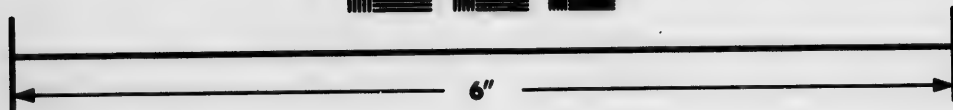
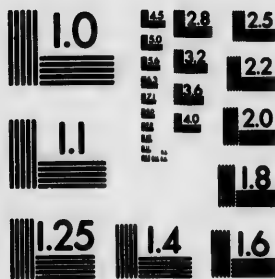


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ferred to by the affidavit as an exhibit, and not to be annexed thereto. (3rd June, 1853; Ord. 42, s. 6.)

Where accounts are brought in, in an improper form, a party who has acquiesced therein cannot afterwards set them aside, *Weale v. Rice*, C. P. Cooper, 438.

228. The Master, if he thinks fit, may direct that in taking accounts, the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objection thereto as they may be advised. (3rd June, 1853; Ord. 42, s. 2.)

This section applies only where the vouchers have been lost and the accounts cannot be taken in the ordinary way; such directions will not be given merely to save expense, nor when ordinary evidence can be had, *Lodge v. Pritchard*, 3D. M. & G. 906.

Accounts taken in a suit in Jamaica ordered to be taken as *prima facie* evidence, *Sleight v. Lawson*, 3 K. & J. 292; and see *Swinton v. Carron Co.*, 24 Beav. 346.

Where the books of a manufactory, of which the plaintiff was manager, were kept by the defendant, the Court held that the contents, though not binding on the plaintiff, might, as he had free access thereto, be taken as *prima facie* evidence against him, with liberty to him to surcharge and falsify, *Ogdens v. Battams*, 1 Jur. N. S. 791; and see *Banks v. Cartwright*, 15 W. R. 417; *Hardwicke v. Wright*, 15 W. R. 953.

Where a solicitor was ordered to deliver a bill of costs, an agreement for the payment of a fixed sum being set aside, V. O. Stuart refused to direct that entries made by him several years before, and contemporaneous with the transactions, should be taken as *prima facie* evidence, *Coleman v. Mellersh*, 2 Mac. & G. 309.

229. No states of facts, charges, or discharges, are to be brought into the Master's office; and where original deeds or documents can be brought in, no copies are to be made without special direction. (3rd June, 1853; Ord. 42, s. 5.)

230. Where directed copies, abstracts of, or extracts from accounts, deeds, or other documents and pedigrees,

and concise statements, are to be supplied; and where so directed, copies are to be delivered as the Master may direct. (3rd June, 1853; Ord. 42, s. 5.)

231. A party directed by the Master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the Master, without any warrant or written direction being served for that purpose. (3rd June, 1853; Ord. 42, s. 2.)

232. Before proceeding to the hearing and determining of a reference, the Master may appoint a day in the meantime, if he thinks fit, for the purpose of entering into the accounts and enquiries, with a view to ascertaining what is admitted and what is contested between the parties. (3rd June, 1853; Ord. 42, s. 2.)

233. Where the Master has omitted to appoint a day for the purposes mentioned in Order 232, he may grant to the party bringing in accounts a warrant to proceed on the same, for the purposes aforesaid; such warrant to be underwritten, as follows: "On leaving the accounts of, &c.; and take notice that you are required to admit the same, or such parts thereof as you can properly admit." (3rd June, 1853; Ord. 42, s. 3.)

234. Where it becomes necessary to adduce evidence, or to incur expenses otherwise, in establishing or proving items of account, or other matters which in the judgment of the Master ought, under all the circumstances, to have been admitted by the party sought to be charged therewith, and which the party has refused to admit, the Master, before making his report, is to proceed to tax such costs, occasioned by such refusal, as shall appear to him reasonable and just, and shall state in his report the amount of such costs and how the same were occasioned. (3rd June, 1853; Ord. 42, s. 3.)

235. The party to whom costs are payable under Order 234, is to be entitled, upon the Master's report becoming absolute to the process of the Court to compel payment thereof as in other cases. (3rd June, 1853; Ord. 42, s. 3.)

236. Where the party entitled to receive the general costs of the cause is the party ordered to pay costs under Order 234, he is at liberty to deduct such costs from the general costs, where the general costs and the interlocutory costs, are between the same parties. (3rd June, 1853; Ord. 42, s. 3.)

237. A party seeking to charge an accounting party beyond what he has in his account admitted to have received, is to give notice thereof to the accounting party, stating so far as he is able, the amount so sought to be charged, and the particulars thereof in a short and succinct manner. (3rd June, 1853; Ord. 42, s. 7.) (*Eng. Con. Ord. 35, r. 34.*)

An accounting party who files an affidavit verifying his account, if he is cross examined on such affidavit is entitled to notice of the points on which he is to be cross-examined, *Re Lord*, 2 L. R. Eq. 605] *Wormsley Sturt*, 22 Beav. 398.

238. The Master is to keep in his office a book, to be called the "Master's Book," in which, upon the bringing in of an order of reference, are to be entered, the style of the cause, the name of the solicitor prosecuting the reference, the date of the order being brought in, and the proceedings then taken; and the Master is also to enter therein, from time to time, the proceedings taken before him, and the directions which he gives in relation to the prosecution of the reference, or otherwise. (3rd June, 1853; Ord. 42, s. 4.)

239. Upon the application of any person, the Master is to certify, as shortly as he conveniently can, the several

proceedings had in his office in any cause or matter, and the dates thereof. (3rd June, 1853; Ord. 42, s. 9.)

This order is somewhat different in its language from the order of 3rd June, 1853. By the latter order the certificate could be obtained only, upon any application being made to the Court, and then, only by the person making the application.

As to form of certificate of default in not bringing accounts or documents into the Master's office, see *Sutherland v. Rogers*, 2 Cham. R. 191; *Bennett's Mas. Off.* App. 30.

240. In giving directions, and in regulating the manner of proceeding before him, the Master is to devise and adopt the simplest, most speedy, and least expensive method of prosecuting the reference, and every part thereof; and with that view, to dispense with any proceedings ordinarily taken, but which he conceives to be unnecessary and to shorten the periods for taking any proceedings; or to substitute a different course of proceedings for that ordinarily taken. (3rd June, 1853; Ord 42, s. 2.)

241. Where the Master directs parties not in attendance before him, to be notified to attend at some future day, or for different purposes at different future days, it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, signed by the Master, of the proceedings to be taken, and of the times by him appointed for taking the same. (29th June, 1861.)

242. Where parties are notified by appointment from the Master, of proceedings, to be taken before him, no warrants are to be issued as to such parties, in relation to the same proceedings. (29th June, 1861.)

243. Parties making default upon such appointments, are to be subject to the same consequences as if warrants had been served upon them. (29th June, 1861.)

✓
244. Where in proceedings before the Master, it appears to him that some persons not already parties ought to be made parties, and ought to attend, or be enabled to attend the proceedings before him, he may direct an office-copy of the decree to be served upon such parties; and upon due service thereof, such parties are to be treated and named as parties to the suit, and are to be bound by the decree in the same manner as if they had been originally made parties. (3rd June, 1853; Ord. 42, s. 15.)

245. The office-copy of a decree directed to be served under Order 244, is to be indorsed with a notice to the effect set forth in schedule L to these Orders, with such variations as circumstances require. (3rd June, 1853; Ord. 42, s. 15.)

✓
246. A party served with an office-copy of a decree under Order 244, may apply to the Court, at any time within fourteen days from the date of such service, to discharge the order, or to add to, vary, or set aside the decree. (3rd June, 1853; Ord. 34, s. 7.)

The time of vacation is not reckoned in the computation of the fourteen days, Ord. 408.

The Court has jurisdiction in a proper case to entertain an application, after the expiration of the fourteen days, *Stewart v. Hunter*, 2 Cham. R. 265.

247. As soon as the hearing of any matter pending before the Master is completed, he shall so inform the parties to the reference then in attendance, and make a note to that effect in his book; and after such entry no further evidence is to be received, or proceedings had, without the special permission of the Master; and the Master may proceed to prepare his report or certificate without further warrant, except the warrant to settle, which is to be served on the parties, as the Master directs. (3rd June, 1853; Ord. 42, s. 16.)

A Master's report should bear date the day it is actually signed, and a Local Master cannot sign his report until the costs are finally revised and settled, *Waddell v. McColl*, 14 Grant, 211.

248. Parties are to raise before the Master, in respect of any matter presented in his office, for his decision, all points which may afterwards be raised upon appeal; and in case an appeal is allowed on any ground not distinctly taken before the Master, the Court may order the appellant to pay the costs of the appeal. (6th Feb. 1865; Ord. 36.)

Permitting appeals without objections being previously taken, was a great injustice to the Masters of the Court, as on many occasions objections were taken and argued before the Court on the appeal, which had they been brought under the notice of the Master, would have led him to re-consider his decision and induced him to come to a different conclusion from that at which he did arrive. As objections are the foundation for exceptions, and as the latter must strictly follow the objections, great attention is required in framing them, so that the points may be properly brought before the Court, *Ballard v. White*, 2 Hare, 158.

In England the practice was that there should be four days between the issuing of the warrant "to sign the report" and the return, to allow the opposing or other parties time to object to the draft of the report, if so advised. Where parties were dissatisfied with the Master's finding, and were advised to bring that finding more particularly before the Court, they had then four days allowed them to bring in objections to the draft of such report; and unless those objections were carried in, the Court would not afterwards allow a party to except to the report; unless under very special circumstances, *Noel v. Ward*, 1 Madd. 339; *Pennington v. Lord Muncaster*, 1 Madd. 555; *Wood v. Lambirth*, 9 Sim. 195. Where permission given to file exceptions, where no objections to the draft report brought in before the Master, the party depending upon the chance of his appeal to the Court seeking delay, though the objections are allowed, yet the party, for the neglect and occasioning trouble to the Court, shall pay such costs as the Court thinks reasonable, *Bowker v. Nickson*, 3 Madd. 489; leaving objections not mere form, but to enable the Master to re-consider his opinion, *Ibid*.

Where, from the nature of the case, the Master considers it proper to allow the party further time to prepare and bring in his objections, he does so, on his being attended by the parties on a warrant taken out for that purpose, by the party requiring time. As to objections generally, see *Otley v. Pensam*, 1 Hare, 392.

249. In the Master's reports no part of any account, charge, affidavit, deposition, examination, or answer, brought in or used in the Master's office, is to be stated or recited, but, instead thereof, the same may be referred to by date or otherwise, so as to inform the Court as to the paper or document so brought in or used. (3rd June, 1853; Ord. 42, s. 12.)

250. Reports affecting money in Court, or to be paid into Court, are to set forth in figures, in a schedule, a brief summary of the sums found by the report, and which may be paid or payable, into, or out of Court. (10th Sept. 1866; Ord. 16.)

251. As soon as the Master's report or certificate is prepared, it is to be delivered out to the party prosecuting the reference, or in case he declines to take the same, then, in the discretion of the Master, to any other party applying therefor; and a common attendance is to be allowed to the party taking the same. (3rd June, 1853; Ord. 42, s. 16.)

252. A report is to become absolute, without an order confirming the same, at the expiration of fourteen days after the filing thereof, unless previously appealed from. (29th June, 1861.)

253. An appeal shall lie to the Court, upon motion, at any time after the signing of the report until the expiration of fourteen days from the filing of the same, in respect of the finding of the Master upon any matter presented in his office for his decision, without written objections or exceptions being previously taken. (29th June, 1861.)

This order differs from the order of the 21st June, 1861, by providing for an appeal without *written* objections being taken; as to taking objections see Order 248.

If any of the parties are dissatisfied with the Master's report, an appeal from it may be brought at any time within fourteen days after it is filed and the service of a notice of motion by way of an appeal within the fourteen days will prevent the report being confirmed, although the appeal may not be heard till after the expiring of the fourteen days, *Grimshaw v. Parks*, 6 U. C. L. J. 142.

When the fourteen days have been allowed to pass without serving notice of appeal, the Court may, under special circumstances, give leave to appeal; but such leave can be obtained only upon motion, notice of which must be given, *Cosens v. McDougal*, 1 Cham. R. 29; *Larkin v. Armstrong*, 1 Cham. R. 31; *Cade v. Newhall*, 1 Cham. R. 200; and as to what should be shewn on such an application, see *Thompson v. Walker*, 1 Cham. R. 266.

A party having delayed for one day beyond the time allowed for appealing, the other side, instead of moving to set aside the proceeding, served notice of a cross appeal, it was held that the irregularity was thereby waived, *Larkin v. Armstrong*, 1 Cham. R. 31.

Where the Master made a clerical error in his report, apparent on the face of it, the Court made an order correcting the report on the *ex parte* application of the plaintiff, *White v. Courtney*, 1 Cham. R. 11; *Watson v. Moore*, 1 Cham. R. 266; but where the Master, in proceeding to take an account under a decree on further directions, finds he has made a mistake in taking the accounts under the original decree, he is not at liberty to correct such mistake by his subsequent report. The Master having, without the order of the Court, reviewed his first report, and corrected by his subsequent report an error found in the first, it was held that he had exceeded his jurisdiction, and that the objection being apparent on the face of the report, the objecting party was not driven to appeal, *Crooke v. Street*, 1 Cham. R. 78.

The Master's report is *prima facie* evidence of what it contains, unless appealed from, and no motion founded on such report can be entertained while the appeal is unheard, *Nichols v. McDonald*, 6 Grant, 459.

All applications in the nature of an appeal from a Master's judgment should be made in Court and not in Chambers, *Ledyard v. McLean*, 1 Cham. R. 183; *Jay v. Macdonell*, 2 Cham. R. 71; and see *Gould v. Burritt*, 1 Cham. R. 280. As to apportioning costs where some grounds of appeal fail and others succeed, see *Bank of Montreal v. Ryan*, 13 Grant, 204.

There may, in a proper case, be an appeal from the Master's ruling as to the admissibility of evidence, before the Master makes his report, *McDonald v. Wright*, 12 Grant, 552.

Where an incumbrancer who objected to the order of priority in which he was placed, appealed from the finding of the Master, the Court considered

this the more convenient form to adopt, although it was open to him, to have moved to discharge the Master's order, *McDonald v. Roger*, 9 Grant, 75.

Where a party appealed from a report and some of the grounds of appeal were allowed, and the Report referred back to be reviewed, an appeal will not lie against the further report thereon, for matters disposed of by the first report, and not objected to on the appeal, *Ross v. Perrault*, 13 Grant, 206.

Where a reference back to the Master to review his report is directed, the Master is as of course at liberty to receive further evidence; where the Court does not mean that he shall take further evidence, the order contains a direction to that effect, unless the reference back is expressed to be for a purpose on which further evidence could not be material, *Morley v. Matthews*, 12 Grant, 458.

254. Any party affected by a report may file the same, or a duplicate thereof, and the filing of a duplicate shall have the same effect as the filing of the report. (29th June, 1861.)

As directed by order of the Court
255. Where the Master is directed to appoint money to be paid at some time and place, he is to appoint the same to be paid into some bank at its head office, or at some branch or agency office of such Bank, to the joint credit of the party to whom the same is made payable, and of the Registrar of the Court; the party to whom the same is made payable to name the Bank into which he desires the same to be paid, and the Master to name the place for such payment. (29th June, 1861.)

This order is an extension of the order of 29th June, 1861, which provided for the payment of mortgage money only at a bank.

Where before the day for payment the agency of the bank was closed, on motion to substitute another bank at the same place, it was held that a new day for payment must be fixed, and the order served, *King v. Connor*, 1 Cham. R. 274.

256. Where money is paid into a Bank, in pursuance of such appointment, the party paying, may pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of the party and the Registrar. *Regis. ch.*

traz; and if the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of the Court. (29th June, 1861.)

As to costs of obtaining an order for payment of the money, see *Bernard v. Alley*, 2 Cham. R. 91.

257. Where default is made in the payment of money appointed to be paid into a Bank, the certificate of the Cashier, Manager, or Agent of the Bank, where the same is made payable, or of the like Bank officer, shall be sufficient evidence of default. Where the affidavit of the party entitled to receive the same is by the present practice required, the same shall still be necessary. (29th June, 1861.)

The Bank certificate of non-payment should be made by the Cashier or other like officer, the certificate of the accountant, as such, is not sufficient, *Campbell v. Garrett*, 1 Cham. R. 255.

XIX.—AFFIDAVITS.

258. All affidavits are to be taken and expressed in the first person of the deponent, and his name at the commencement of the affidavit is to be written in full, and not designated by any initial letter merely; and the jurat may be in the form or to the effect set forth in schedule M hereunder written. No costs are to be allowed in respect of an affidavit which has not been drawn in conformity with this order. (3rd June, 1853; Ord. 40, s. 5.)

Every affidavit to be used in any cause or matter must be written in a plain and legible manner, and must be divided into paragraphs, and every paragraph must be numbered consecutively, and be confined as nearly as may be to a distinct portion of the subject, and if any affidavit violate the above directions, no costs are to be allowed for it, nor can it be used in support of, or in opposition to, any motion without the express permission of the Court, Ord. 68.

Every affidavit should be intitled in the cause or matter in which it is made, and contain the true place of residence, description, and addition of the deponent, and great care should be taken that the names of parties are accurately set forth, *Salomon v. Stalman*, 4 Beav. 243; *May v. Prinsep*, 11 Jur. 1032; but see *Hawes v. Bamford*, 9 Sim. 653; *Pearson v. Wilcox*, 10 Ha. App. 35, where affidavits erroneously entitled, were allowed to be taken off the file, and sworn without a fresh stamp; and see *Fisher v. Coffey*, 1 Jur. N. S. 956. This order does not apply to parties in the cause, who may describe themselves as the above mentioned plaintiff or defendant without specifying any residence, addition or other description, *Crockett v. Bishton*, 2 Madd. 446; see further, as to the title of affidavits, *Re Harris*, 8 Jur. N. S. 166; *Re Barnes*, 5 L. T. N. S. 787. If made on a petition under an Act of Parliament, they must be entitled in the Act, *Mackenzie v. Mackenzie*, 5 DeG. & S. 388.

An affidavit cannot be made in a suit until the bill is filed, *Francome v. Francome*, 13 W. R. 355; *Fennal v. Brown*, 18 Jur. 1051; but where it is necessary to have an affidavit annexed to a bill at the time of filing, it is no objection to the affidavit that it was sworn before the bill was filed, *Walker v. Fletcher*, 12 Sim. 420.

Affidavits filed under a petition, the heading of which has been altered, need not be re-sworn, but may be made evidence in the petition under the new title by a short affidavit referring to them, *Re Vartig Iron Works, Wesleyan Chapel*, 10 Ha. App. 37.

Affidavits filed in a cause may be read in support of a petition in the cause, *Jones v. Turnbull*, 22 L. J. Ch. 1055; or by leave of the Court, of a petition in the matter, *Re Pickance*, 10 Ha. App. 85.

Affidavits sworn abroad in the third person received as evidence, *Re Husband*, 12 L. T. N. S. 303; *Dryden v. Frost*, 8 Sim. 380; and trifling irregularities have been overlooked, see *Gates v. Beechland*, 13 W. R. 67; *Meek v. Ward*, 10 Ha. App. 1; but the signature of the party cannot be dispensed with, *Anderson v. Stather*, 9 Jur. 1085; nor the words "make oath," *Phillips v. Prentice*, 2 Ha. 542; *Re Newton*, 2 D. F. & J. 3.

An affidavit containing scandalous and irrelevant matter may be ordered to be taken off the file, *Goddard v. Parr*, 3 W. R. 633; *Kernick v. Kernick*, 12 W. R. 335.

259. Each statement in an affidavit, which is to be used as evidence on any proceeding before the Court, or before a Judge, or before an officer of the Court, is to shew the means of knowledge of the person making the statement. (10th July, 1861.)

Where there is no personal knowledge, the words "I am informed," are the same as "I believe," *Woodhatch v. Freeland*, 11 W. R. 398.

260. Affidavits, either in support of, or in opposition to, any special motion or petition, are to be filed, with the Clerk of Records and Writs. This Order is not to be taken to warrant the taxation of the costs of obtaining office-copies of affidavits, for use upon the hearing of any matter, by the party on whose behalf they are filed. (3rd June, 1853; Ord. 40, s. 2; 29th June, 1861.)

261. All the affidavits upon which a notice of motion, or petition is founded, must be filed before the service of the notice of motion or petition; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion, or petition. (3rd June, 1853; Ord. 40, s. 2; 29th June, 1861.)

Affidavits of service must be filed at latest before the rising of the Court on the day on which the application is made, *Lord Milltown v. Stuart*, 8 Sim. 34.

In a very special case affidavits filed after the motion was opened were admitted, *East Lancashire Rail. Co. v. Hattersley*, 8 Ha. 86; and see *Smith v. Swansea Dock Co.*, 9 Ha. App. 20; and where an affidavit was filed too late for the hearing of a petition, it has been admitted on appeal, *Re Gibraltar & Malta Banking Co.*, 13 L. T. N. S. 263.

In giving notice of motion, and that the party moving will read certain affidavits, if the same are filed at any time before the date of the notice of motion, the notice must state the date of the filing thereof, otherwise they cannot be used, *Fraser v. Fraser*, 13 Grant, 183; and see *Clement v. Griffith*, Coop. 470.

XX.—MOTIONS AND PETITIONS.

262. A notice of motion by a party to the suit, may be served with the bill, or at any time after the bill is served, without the leave of the Court. (3rd June, 1853; Ord. 39, s. 1.)

This is a variation from the Order of 3rd June, 1853, which permitted a notice of motion to be served at any time *after bill filed*.

A notice of motion given for a day which is not a regular Court day unless the leave of the Court has been obtained, is a void proceeding and the party served need not appear thereon, *Stevenson v. Huffman*, 4 Grant, 318; *Steedman v. Poole*, 11 Jur. 555; and if leave is given to serve notice

for such a day, or to give less than two clear days notice, it must be so stated in the notice of motion, *Hill v. Rimell*, 8 Sim. 632; *Harris v. Lewis*, 8 Jur. 1063; but when an injunction is granted to a particular day, and which is not a motion day, and the writ is served, together with a notice of motion for that day to extend the injunction, the notice is not irregular, though it omits to mention that such notice is given by leave of the Court, *Johnson v. Cass*, 11 Gr. 117.

The notice should set out the style of the cause correctly, *Rowlatt v. Cattell*, 2 Hare, 186; *Pollard v. Doyle*, 2 W. R. 509; and should express shortly the object of the application, the person on whose behalf it is made, and the day on which it is returnable. If it be intended to ask for the costs of the application the notice should so express it, otherwise if the respondent does not appear the costs of the motion cannot be given, *Pratt v. Walker*, 19 Beav. 261; but if he do appear costs may be given though not asked by the notice, *Clark v. Jaques*, 11 Beav. 623; *Butler v. Gardener*, 12 Beav. 525; *Dawson v. Jay*, 2 W. R. 598.

Where a notice of motion was directed to the solicitor of the opposite party by a wrong name, an order obtained upon an affidavit of service thereof was set aside as irregular, *Moody v. Hebbard*, 11 Jur. 941.

Affidavits upon which any notice of motion is founded must be filed at the time of the service of such notice of motion, and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion, *Ord.* 261.

Affidavits cannot be used on a motion, where no intention to read affidavits thereon is mentioned in the notice of motion, *Furish v. Martin*, 1 Grant, 300.

If a plaintiff gives notice of his intention to read an affidavit on the hearing of a motion, but declines to do so, the defendant is nevertheless entitled to read it, *Cauty v. Houlditch*, 14 Sim. 75; *Clarke v. Law*, 2 K. & J. 28.

A party is not bound to search for affidavits further back than the date of the notice of motion; and if it be intended upon making the motion to read any affidavits which have been previously filed in the cause, notice of such intention should be given to the opposite party, *Clement v. Griffiths*, Coop. 470; *Fraser v. Fraser*, 13 Grant, 183.

The Court will at any time previous to the hearing postpone a motion in order to give time for filing affidavits in reply, *Electric Telegraph Co v. Nott*, 11 Jur. 273.

Oral evidence may also be used upon any motion; for the mode of procuring the attendance of witnesses and of cross-examining parties who have made affidavits, see *Ord.* 266.

When a notice of motion embraces two objects and the principal one fails, the party moving must pay the costs, *Sturch v. Young*, 5 Beav. 557. The plaintiff having given notice of motion for an injunction it was

ordered to stand over at the request of the defendant; before the motion was heard the defendant filed a demurrer, which was allowed together with the costs of the suit, *held* that the defendant was entitled to the costs occasioned by the motion, *Fenden v. Stephens*, 12 Jur. 319.

A motion which has been opened cannot be afterwards treated by the party moving, as an abandoned motion, but the parties opposing are entitled to their costs as on a motion refused, *Dugdale v. Johnson*, 5 Hare, 92.

Where costs of an abandoned motion have been ordered to be paid, a second motion for the same purpose cannot be made until the costs of the first have been paid, *Bellchamber v. Giani*, 3 Mad. 550; *Killing v. Killing*, 6 Madd. 68; *Oldfield v. Cobbett*, 12 Beav. 91; *Denison v. Devlin*, 11 Grant, 84; and see notes 23 Beav. 550.

Where a motion is refused with costs, a second motion for the same purpose cannot be made until the costs of the first are paid, *Harvie v. Fergusson*, 1 Cham. R. 218.

263. There must be at least two clear days between the service of a notice of motion, and the day named in the notice for hearing the motion, unless the Court or a Judge, give special leave to the contrary; and in the computation, of such two clear days, Sundays, and days on which the offices are closed, are not to be reckoned. (3rd June, 1853; Ord. 39, s. 2.)

264. Except in cases where it is otherwise provided, there must be at least two clear days between the service of a petition, and the day appointed for hearing the same; and in the computation of such two clear days, Sundays, and days on which the offices are closed, are not to be reckoned. (3rd June, 1853; Ord. 39, s. 2.)

When an application is of such a nature as to require a detailed statement of the facts and circumstances upon which it is founded, the proper course is to make it by petition.

And as a general rule where an application is made in a suit by any person not a party to the suit, it should be made by petition; but when the notice of motion shews the title of the applicant, and no long statement of facts is necessary for that purpose, a person not a party to the record may apply by motion, *Jones v. Roberts*, 12 Sim. 189; *Earl of Port Darlington v. Damer*, 2 Phil. 264.

Where a decree reserved further directions and costs, but the further

directions became unnecessary, the costs were disposed of upon petition, *Winthrop v. Winthrop*, Coop. 201.

If presented by a person not a party to the suit, his name, residence and description must be set forth, *Glazbrook v. Gillatt*, 9 Beav. 492; *Hunter v. Mountjoy*, 2 Cham. R. 90.

A petition may be amended by consent, at the hearing, *Matson v. Swift*, 9 Jur. 521; or even after the order is drawn up, *Hislop v. Wykeham*, 3 W. R. 286; *Re Bunnett*, 1 Jur. N. S. 921; but where a petition was amended by stating facts which occurred after the leave to amend was given, it was dismissed with costs, *Doubtfire v. Elworthy*, 15 Sim. 77.

Before any order made on a petition can be passed, the original petition must be filed, and where the original was lost, the Court allowed a copy to be filed in its stead, *Sanderson v. Walker*, 1 M. & C. 359; *Smith v. Harwood*, 1 Sm. & G. 137; and the same was allowed where the petitioner refused to deliver the petition to the respondents to be filed, *Andrews v. Walton*, 1 M. & C. 360; *Re Hobler*, 9 Jur. 419.

In general a party served with a petition will not be entitled to his costs, if he appears merely for the purpose of claiming them, *Barton v. Latour*, 18 Beav. 526; *Day v. Croft*, 19 Beav. 518.

265. It shall not be necessary to procure a Judge's fiat to a petition appointing a time and place for the hearing thereof, but in lieu of such fiat there is to be indorsed on the petition a notice addressed to the parties concerned, stating the time and place at which the petition is to be heard, and informing them that if they do not appear on the petition at such time and place, the Court may make such order, on the petitioner's own shewing, as shall appear just. (6th Feb. 1865; Ord. 30.)

266. A party in any cause or matter may, by a writ of subpoena *ad testificandum*, or *duces tecum*, require the attendance of a witness before the Court, or before a Master, or an Examiner, for the purpose of using his evidence upon any motion, petition, or other proceeding before the Court. (3rd June, 1853; Ord. 40, s. 7.)

On a motion for an injunction against one defendant, the cross-examination of another defendant on his answer, is inadmissible in reply to affidavits filed in answer to the motion, where the defendant against whom the plaintiff moves had no notice of the cross-examination, or of the intention to read the depositions on the motion, *Curtis v. Dale*, 12 Grant, 244.

The examiner is not to judge what evidence is relevant or adverse, *Buckley v. Cooke*, 1 K. & J. 29. As to the powers and privileges of an examiner in general, see *Wright v. Wilkin*, 6 W. R. 643. A defendant may cross-examine another defendant's witnesses, *Lord v. Colvin*, 3 Drew, 222.

The Master is bound to allow a witness to be cross-examined on the whole case, without regard to his examination in chief; but in some cases he may exercise his discretion as to who should pay the fees of the examination, *Crandell v. Moon*, 6 U. C. L. J. 143.

A defendant may cross-examine a co-defendant's witness, *Lord v. Colvin*, 3 Drew. 222; all the evidence is common to all parties, *Sturges v. Morse*, 26 Beav. 562.

Where defendant cross-examines plaintiff's witness it is convenient that other defendants in the same interest with plaintiff should cross-examine him afterwards, and then the first defendant re-examine, *Harrison v. Mayor of Southampton*, 2 Jur. N. S. 435; where plaintiff and other defendants wish to cross-examine, it is convenient that plaintiff cross-examine first, *Lord v. Colvin*, 3 Drew. 222.

A solicitor cannot be compelled to produce his client for examination, *Spicer v. Dawson*, 22 Beav. 282; *Winthrop v. Elderton*, 1 W. R. 318.

A witness who is required to attend under this section is not entitled to forty-eight hours notice of such examination, but to such notice, whether more or less, as under the circumstances may be reasonable, *Re North Wheel Exmouth Mining Co.*, 8 Jur. N. S. 1168; 31 Beav. 628; where a party to the suit, having no solicitor, is required to attend to be examined, he should have forty-eight hours' notice given him, *Watson v. Ham*, 1 Cham. R. 293.

A witness who has waited at the Examiner's office half an hour without receiving any notice that it is intended to proceed with the examination, may leave with impunity, *Perks v. Stottart*, 1 N. R. 563.

Professional witnesses may require compensation before giving evidence, *Clarke v. Gill*, 1 K. & J. 19; the scale of allowance in such a case does not depend on a witness's valuation of his own time, but consists of a fixed payment, corresponding with that allowed in Courts of Common Law, *Nokes v. Gibbon*, 8 Jur. N. S. 282; *Turner v. Turner*, 1 W. R. 573. A witness may demand to have his travelling expenses paid before attending to be examined, *Brocas v. Lloyd*, 23 Beav. 129; and when brought up to be examined he may insist, before giving evidence, on being paid for his loss of time, *Wiltshire v. Marshall*, 1 W. N. (1866), 80; and the rule applies to parties to suits as well as other witnesses, *Davey v. Durant*, 24 Beav. 493.

Documents used on the examination of witnesses before an examiner must be properly marked by the officer, and referred to in the evidence, otherwise they cannot be read at the hearing, *Hollywood v. Waterk*, 3 Grant, 329.

As to compelling the attendance of witnesses, see note to Order 188.

When a witness objects to answer because the examination is irregular, the party examining him should move that the examination may proceed, *Rendle v. Metropolitan & Provincial Bank*, 15 W. R. 1068; *Leather Cloth Co. v. Hirschfeld*, 1 H. & M. 295; but if he objects that he is prohibited from making the discovery, the demurrer should be set down for hearing, *Daniel's Pr.* 863; and where an examiner, notwithstanding the demurrer of a witness, took upon himself to examine the witness, the depositions were suppressed, even though the demurrer was held untenable, *Goodale v. Gawthorn*, 4 DeG. & Sm. 97.

A defendant may be examined *viva voce* in support of a motion, notice of which has been given, although the time for answering has not expired, *McClennaghan v. Buchanan*, 7 Grant, 92.

267. Forty-eight hours notice of the examination is to be given to the opposite party, or parties, and the cross-examination, in such case, is to follow immediately upon the examination, and is not to be deferred to any future time. (3rd June, 1853; Ord. 40, s. 8.)

This order applies to the opposite party, not to the witness, who is entitled to reasonable notice, according to circumstances, *Re North Wheal Ezmouth Mining Co.* 31 Beav. 628.

268. Any person having made an affidavit to be used, or which shall be used on any motion, petition, or other proceeding before the Court, shall be bound to attend for the purpose of being cross-examined, on being served with a writ of subpoena *ad testificandum*, but the Court nevertheless, may act on the evidence before it at the time, and may make such *interim* order, or otherwise, as appears necessary to meet the justice of the case. (3rd June, 1853; Ord. 40, s. 7.)

A witness, when cross-examined on his affidavit, has no right to insist that the paragraph in his affidavit on which he is cross-examined should be shown to him before he answers the questions, *Gwynne v. Watney*, 31 L. T. 231.

269. Forty-eight hours' notice of the cross-examination is to be given to the party on whose behalf such affidavit

was filed, or to the party intending to use the same. (3rd June, 1853; Ord. 40, s. 9.)

See note to Order 267.

MOTION FOR DECREE.

270. The plaintiff, at any time after the period allowed for answering has expired, but before replication, may move the Court for such order as he thinks himself entitled to, in the three following classes of cases:—

1. Where there is no evidence;
2. Where the evidence consists only of documents and such affidavits as are necessary to prove their execution or identity, without the necessity of any cross-examination;
3. Where infants are concerned, and evidence is necessary only so far as they are concerned, for the purpose of proving facts which are not disputed.

This order is not to apply to cases in which the Court gives leave to serve short notice of motion for decree. (3rd June, 1853; Ord. 16, s. 1; 29th June, 1861.)

On a motion for decree, the plaintiff is assumed, for the purposes of the motion, to admit all the statements of the answer of which proof would be receivable at a hearing in term, *Wilson v. Cassey*, 14 Grant, 80.

A plaintiff having given notice of motion for a decree, cannot abandon such proceeding and set the cause down for hearing in the usual way; if he desires to do so, he must apply to the Court for leave, *McLaughlan v. Whitside*, 1 Cham. R. 56.

A declaration of right may be made on a motion for decree, *Bernasconi v. Atkinson*, Seton on Decrees, 174; and the Court has power to dismiss the bill, or to dismiss the motion with costs and leave the cause to come on for hearing, *Thomas v. Bernard*, 5 Jur. N. S. 31; *Warde v. Dickson*, 5 Jur. N. S. 698.

271. Where it is made to appear to the Court that it

will be conducive to the ends of justice to permit a notice of motion for decree to be served before the time for answering has expired, the plaintiff may apply to the Court or a Judge, *ex parte*, for that purpose, at any time after, the bill has been filed, and the Court, if it thinks fit, may order the same accordingly; and when such permission is granted, the Court is to give directions, as to the service of the notice of motion and filing of the affidavits, as it deems expedient. (3rd June, 1853; Ord. 17.)

To induce the Court to act under this order some special ground must be shewn, *Davidson v. McKillop*, 4 Grant, 146.

272. Upon the hearing of a motion for a decree, the Court may, instead of either granting or refusing the application, give such directions for the examination of either parties or witnesses, or for the making of further enquiries, or with respect to the further prosecution of the suit, as the circumstances of the case may require, and upon such terms as to costs as it thinks right. (3rd June, 1853; Ord. 17.)

MOTION TO DISMISS.

273. A defendant may move the Court, upon notice, that the bill may be dismissed with costs for want of prosecution, and the Court may order the same accordingly, in the following cases:—

1. If the plaintiff, not having obtained an order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree, within one month after the answer, or the last of the answers has been filed;

2. If the plaintiff, not having obtained an order to enlarge the time, does not amend the bill within fourteen days after the date of the order for leave to amend ;
3. If the plaintiff, not having obtained an order to enlarge the time, does not set down the cause to be heard, at the next sittings of the Court at the place where the venue is laid, in case issue has been joined three weeks before the commencement of such sittings. (3rd June, 1853 ; Ord. 24, s. 1.)

In computing the time, the plaintiff is entitled until 12 o'clock at night of the last day, therefore a notice of motion served on that day is premature, and will be discharged with costs, *Preston v. Collett*, 20 L. J. Ch. 228 ; and if notice be given too early the defect is not cured by an accidental postponement of the motion, *DeGeneve v. Hannam*, 1 R. & M. 494. If the defendant be in contempt he cannot move, *Anon*, 15 Ves. 174.

The general rule is that each defendant is entitled to make the application independently and without any reference to the state of the proceeding as between the other defendants and the plaintiff, *Lester v. Archdale*, 9 Beav. 156 ; *Earl of Mornington v. Smith*, 9 Beav. 250 ; *Jones v. Morgan*, 12 Jur. 388. In this order the words "last answer" mean, not the answer of the last defendant, but the last answer of the particular defendant moving to dismiss, *Dallon v. Hayter*, 7 Beav. 586 ; *Sprye v. Reynell*, 10 Beav. 351. Thus one defendant may move though his co-defendants may not have put in their answers, *Lester v. Archdale*, 9 Beav. 156, but the Court will not make the order if the plaintiff can shew that he has used due diligence to get in the answers of the other defendants. Where it appeared that a defendant who was in a position to move to dismiss was aware of the residence of a co-defendant whom the plaintiff could not (though using reasonable diligence, of which the defendant moving was aware,) find to serve with the bill, a motion by such defendant to dismiss for want of prosecution was refused with costs, *Shaver v. Alison*, 1 Cham. R. 203. And it is not enough for the plaintiff to shew that the answers of the other defendants had not been filed, he must also shew that he has used due diligence to have them served, and to get in their answers, *Baldwin v. Damer*, 11 Jur. 723 ; *Stinton v. Taylor*, 4 Hare, 608 ; and see as to delay in prosecuting the suit, *Davy v. Davy*, 2 Cham. R. 26.

Where the delay in prosecuting the suit was flagrant, the fact that the defendant had pleaded the Statute of Limitations was held to be no argu-

ment against dismissing the bill, but rather as an argument against the plaintiff, *Mulholland v. Brent*, 2 Cham. R. 31.

A defendant who is in a position to move to dismiss, cannot do so if a co-defendant appearing by the same solicitor has not filed his answer, *Winthorp v. Murray*, 7 Hare, 150; and see *Rees v. Jacques*, 1 Grant, 352; *Cotton v. Cameron*, 1 Cham. R. 122; *Partington v. Bailis*, 5 Sim. 667.

A motion to dismiss pending an order to amend is irregular, *Emerson v. Emerson*, 12 Jur. 973; but not where the order was that in default of amendment the bill should *ipso facto* stand dismissed, *Dobede v. Edwards*, 11 Sim. 454; and where a motion to amend having been refused, the plaintiff moved to discharge the order refusing leave to amend, a motion to dismiss, pending the motion to discharge the order, was held irregular, *Cameron v. VanEvery*, 1 Cham. R. 217.

The plaintiff upon being served with notice of motion to dismiss after answer, and before the cause is at issue, should either file a replication and tender to the defendant the costs, or apply specially for leave to amend, *Findlay v. Lawrence*, 11 Jur. 705; or appear upon the motion and ask for such terms as the state of the cause may justify.

The plaintiff having served an order to produce and the defendant having filed his affidavit on production, a copy was demanded, and the demand never having been complied with, a motion by the defendant to dismiss for want of prosecution was refused with costs, *Proudfoot v. Thompson*, 1 Cham. R. 367; but see *Gillespie v. Gillespie*, 2 Cham. R. 267, where it was held that defendant having failed to obey an order to produce was no obstacle to his moving to dismiss.

The death of one defendant is no bar to a co-defendant moving to dismiss for want of prosecution, *Williams v. Page*, 24 Beav. 490; *Hall v. Green*, 2 U. C. Jur. 42; *Rice v. George*, 2 Cham. R. 74; *Kelly v. Macklem*, 2 Cham. R. 132.

An order will not be granted to stay proceedings or dismiss the bill in a suit merely because the subject matter of it has gone, the plaintiff has a right to proceed to a hearing to shew himself entitled to costs *Wallace v. Ford*, 1 Cham. R. 282.

Where the defendant serves a notice of motion to dismiss, but before the return day, the plaintiff takes out on precipe, and serves an order to dismiss his bill, the defendant cannot bring on his motion, but he is entitled to tax his costs under the order to dismiss as costs in the cause, *Purdy v. Ferris*, 1 Cham. R. 303.

Where the plaintiff files replication before the motion is heard, the only order which the Court will make is that he pay the costs of the motion, *Corry v. Curlew*, 8 Beav. 606; and if the plaintiff in addition to replying tenders the costs of preparing and serving the notice of motion, the defendant should accept them, for if he bring on his motion he will be ordered to pay the costs of it, less the amount properly tendered to him, *Wright v. Angle*, 12 Jur. 34; *Piper v. Gittens*, 11 Sim. 282; but see now, *Ord. 273*.

If liberty to amend be given on special application, after the notice to dismiss is served but before it is heard, the defendant may bring on his motion in respect of the costs, unless the plaintiff has tendered them, *Findlay v. Lawrence*, 11 Jur. 705. A motion to amend is no answer to a motion to dismiss for want of prosecution, *McNab v. Gwynne*, 1 Grant, 127.

As a general rule the Court will not on a motion to dismiss for want of prosecution, enter into the merits to determine whether the bill should be dismissed without costs, but will consider only the conduct of the parties to the cause in respect of its prosecution, *Stagg v. Knowles*, 3 Hare, 241.

But under special circumstances, where it appeared inequitable that the defendant should either compel the plaintiff to proceed or submit to his bill being dismissed, the Court has entered into the question, and dismissed the bill without costs, *Pinfold v. Pinfold*, 16 Jur. 1081; *Goddard v. Sleight*, 3 W. R. 87; *Sutton Harbour Co. v. Hitchcus*, 15 Beav. 161; *Wright v. Barlow*, 5 DeG. & S. 43; and see *Berrie v. Macklin*, 1 Cham. R. 251.

After a bill has been dismissed against one of several defendants, it is not necessary to omit from the style of the cause the name of the defendant against whom the bill has been dismissed; the retention of the name is not irregular, *Upper Canada Mining Co. v. Attorney-General*, 2 Cham. R. 185.

After an order dismissing a bill for want of prosecution had been granted upon notice, the plaintiff applied to discharge the order, alleging his intention of prosecuting the suit, and that he had not received any personal notice of the motion to dismiss; the application was granted upon payment of costs, and the terms of paying into Court certain moneys claimed to be due to the defendant, *Campbell v. Ferris*, 1 Cham. R. 50; and see *Upper Canada Mining Co. v. Attorney-General*, 2 Cham. R. 207; *Kelly v. Macklem*, 2 Cham. R. 132.

The Court refused to entertain a motion to reinstate a bill based on grounds which might have been shewn on resisting the motion to dismiss, *Bank of Montreal v. Wilson*, 2 Cham. R. 117.

274. Where the plaintiff has amended his bill, after answer, a defendant may move the Court upon notice, that the bill may be dismissed with costs, for want of prosecution; if the plaintiff, not having obtained an order to enlarge the time, does not file the replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree, within the times following:—

1. Within fourteen days after the amendment of the

bill, where no answer has been filed, and the defendant has not obtained or applied for time to answer ;

2. Within fourteen days after the refusal of an application for further time, in cases where the defendant, desiring to answer, has not put in his answer within seven days after the amendment of the bill ;
3. Within fourteen days after the filing of the answer, in cases where the defendant has put in an answer to the amendments, unless the plaintiff, within such fourteen days, has obtained leave to re-amend the bill. (3rd June, 1853 ; Ord. 24, s. 2.)

275. In every other case, where the plaintiff is delaying the suit unnecessarily, any defendant may move the Court, upon notice, that the bill may be dismissed with costs, for want of prosecution, after the expiration of one month from the time of filing his answer, in case the plaintiff, not having obtained an order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause to be heard on bill and answer, or serve notice of motion for a decree, within such month ; and upon the hearing of the motion, the Court is to make such order for the dismissal of the bill, or for the expediting of the suit, or as to costs, as under the circumstances of the case seems just. (3rd June, 1853 ; Ord. 24, s. 3.)

The fact that a replication has been filed, and that the defendant is therefore in a position to set the cause down for examination and hearing, is no bar to a motion to dismiss for want of prosecution, *Spaw v. Nelles*, 1 Cham. R. 270 ; *Rice v. George*, 2 Cham. R. 74.

If the motion be made by one of several defendants, it is not enough for the plaintiff to shew that he has not got in the answers of the other defendants ; he must also shew that he has used due diligence to have

them served and to get in the answers, or take the bill *pro confesso*, against them, *Earl of Mornington v. Smith*, 9 Beav. 251; *Baldwin v. Damer*, 11 Jur. 723; *Stinton v. Taylor*, 4 Hare, 608.

An injunction does not prevent a defendant from moving to dismiss for want of prosecution, *Doy v. Snee*, 3 V. & B. 170; *James v. Biou*, 3 Swanst. 234. The Court may grant the plaintiff further time, but it is usual to do so only on terms as to the future conduct of the suit. An information by the Attorney-General cannot be dismissed for want of prosecution; it is his privilege to proceed in what way he thinks proper; but an information in his name by a relator is subject to be dismissed with costs for want of prosecution, *Daniel's Chan. Pr.* 20.

On moving to dismiss, the Registrar's certificate must not merely shew what proceedings have been taken; it must state that no further proceedings have been had, *Thompson v. Buchanan*, 3 Grant, 652.

276. Where a defendant is entitled to give a notice to dismiss, it is not to be sufficient answer to the motion, for the plaintiff, after being served with the notice, to take out and serve an order for amending the bill, or to file a replication, or to undertake to speed the cause; but it shall be necessary for the plaintiff to shew that he has prosecuted his suit with due diligence, or that under all the circumstances the bill should not be dismissed, (6th Feb. 1865; Ord. 21.)

Where a defendant had moved to dismiss, and the plaintiff asked for time which was granted, the plaintiff having failed to proceed within the time given, it was held that the defendant could move *ex parte* for the order to dismiss, *Burns v. Chisholm*, 2 Cham. R. 88.

277. A notice of motion to set aside any proceeding for irregularity, must specify clearly the irregularity complained of. (9th May, 1862.)

A party complaining of an irregularity must come promptly and move against it, *Miller v. Miller* 9 U. C. L. J. 132; the rule in the Court of Chancery is similar to that at law, that a party to a cause who takes a fresh step in the cause after notice of an irregular proceeding on the part of his opponent, thereby waives the irregularity, *Manning v. Birely*, 2 U. C. L. J. N. S. 381.

XXI.—RECEIVERS.

278. The party prosecuting the order for a Receiver

is to obtain an appointment or a warrant from the Judge or Master, and to serve the same on all the necessary parties, naming in the copy thereof served, the proposed Receiver and his sureties. (3rd June, 1853; Ord. 38, s. 1.)

279. At the time appointed, the party prosecuting the order is to bring into the Judge's Chambers or the Master's Office, the recognizance or bond proposed as security; the bond or recognizance is to be to the Master. (3rd June, 1853; Ord. 38, s. 1.)

280. Any other party desirous of proposing another person as Receiver, is to serve notice of his intention so to do upon the other parties, naming in such notice the person proposed by him as Receiver, and his sureties, and is then in like manner to bring into the Judge's Chambers or Master's office the recognizance or bond proposed by him as security. (3rd June, 1853; Ord. 38, s. 1.)

281. At the time named in the appointment or warrant the Judge or Master is, in the presence of the parties, or those who attend, to consider of the appointment of the Receiver, and to determine respecting the same; and to settle and approve of the proposed security. (3rd June, 1853; Ord. 39, s. 1)

282. The Master is to make no report approving of or appointing the Receiver; but the Judge or Master is to appoint such Receiver by signing a written appointment to the following effect, viz.: "IN CHANCERY, [*style of cause*]
—I hereby appoint [*Receiver's name*] Receiver in this cause, [*signature of Judge or Master*];" which appointment is to be signed without any warrant or attendance for that purpose. (3rd June, 1853; Ord. 38, s. 1.)

283. When signed, the appointment is to be filed by

the party who has procured the person named by him as Receiver to be appointed, and is then to have the same effect as the filing of the Master's report appointing a Receiver under the former practice; but the same is not to be filed until after the execution and filing of the securities settled and approved by the Judge or Master. (3rd June, 1853; Ord. 38, s. 1.)

A receiver is an indifferent person between the parties, appointed by the Court to receive the rents, issues and profits of lands, or any other thing in question pending the suit, where it does not appear reasonable to the Court that either party should do it; or where a party is incompetent to do so, as in the case of an infant. The appointment of a receiver rests in the discretion of the Court, *Skip v. Harwood*, 3 Atk. 564; *Owen v. Homan*, 3 Mac. & G. 378; and when appointed he is treated as the officer and representative of the Court, and is subject to its orders. A receiver, though an officer of the Court, stands in the position of trustee to all interested in the estate or fund; therefore in making the appointment the Court will endeavour to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feelings of friendship or dislike between the person proposed and those with whom he, in the discharge of his duties, will be brought into frequent communication, *Simpson v. Ottawa and Prescott Rail. Co.* 1 Cham. R. 99.

For cases in which a receiver will be appointed see *Berney v. Sewell*, 1 J. & W. 648; *Owen v. Homan*, 3 Mac. & G. 378; *Silver v. Bishop of Norwich*, 3 Swanst. 112; *Smith v. Smith*, 10 Hare, App. 71; in suits against executors and trustees, *Richards v. Perkins*, 3 Y. & C. Ex. 299; *Brodie v. Barry*, 3 Mer. 695; *Wilson v. Wilson*, 2 Keen, 249; *Pritchard v. Fleetwood*, 1 Mer. 54; *Middleton v. Dodswell*, 13 Ves. 266; but see *Lord v. Purchase*, 17 Beav. 171; in cases of partnership, *Const v. Hurris*, T. & R. 496, 517; *Goodman v. Whitcomb*, 1 J. & W. 589; *Fairburn v. Pearson*, 2 Mac. & G. 144; *Baxter v. West*, 28 L. J. Ch. 169; *Olegg v. Fishwick*, 1 Mac. & G. 294; of a railway, *Simpson v. Ottawa and Prescott Rail. Co.* 1 Cham. R. 126.

A receiver may be appointed of the rents and profits of lands, houses, &c, and of all personal estate which is capable of being reduced into possession, *Watkins v. Brent*, 1 M. & C. 97; *Richards v. Perkins*, 3 Y. & C. Ex. 299; *Rendall v. Rendall*, 1 Hare, 152; and in favour of an equitable creditor, of all property against which a legal creditor can obtain execution, *Davis v. Duke of Marlborough*, 2 Swanst. 132; and of whatever property is considered in equity as assets, *Blanchard v. Cawthorne*, 4 Sim. 566.

A trustee may in some cases be receiver, if he will act without emolument, *Sykes v. Hastings*, 11 Ves. 363; but no one who is a party to the suit, or solicitor, can be receiver with emolument, unless no one else can be got to act, *Garland v. Garland*, 2 Ves. 137; ——— *v. Jolland*, 8 Ves. 72; the next friend of an infant cannot be receiver, *Stone v. Wishart*, 2 Madd. 64.

A receiver is usually prayed for by the bill, but this is not absolutely necessary, *Hart v. Tulk*, 6 Hare, 611; *Rimsbottom v. Freeman*, 4 Beav. 145; *Dowling v. Hudson*, 14 Beav. 423.

The application for a receiver is made to the Court upon motion, notice of which must be served, and it is not necessary to wait until the defendant's answer is filed, *Aberdeen v. Chitty*, 3 Y. & C. Ex. 379; *Meaden v. Sealey*, 6 Hare, 620; but the Court will not, before answer, appoint a receiver, unless a strong case is made for it, *Woodyatt v. Gresley*, 8 Sim. 180; objections to the bill on the grounds of misjoinder, multifariousness and want of parties, have been held no answer to a motion for a receiver, *Evans v. Coventry*, 5 D. M. & G. 911.

The defendant cannot defeat a motion for a receiver by a general affidavit that he has a good defence to the suit; he must specify the defence distinctly, to enable the plaintiff to meet it, and the Court to judge it, *Aikins v. Blain*, 13 Grant, 646.

A receiver may be appointed after an interlocutory decree, *Hiles v. Moore*, 15 Beav. 175; and even where the decree is not interlocutory, *Bowman v. Bell*, 14 Sim. 392; *Re Bywater*, 1 Jur. N. S. 227.

Though the application for a receiver must in the first instance be made to the Court, yet if an order appointing one has been made, vacancies in the office may be filled up in Chambers, *Grote v. Bing*, 9 Hare, App. 50.

Evidence must be produced before the Master as to the nature and value of the property over which the receiver is to be appointed, in order that the Master may fix the amount for which security is to be given.

A receiver having been appointed, it is the duty of the party to the record in possession of the property to deliver up possession to him, and if he refuses to do so, an order may be obtained upon motion that he do by a given day deliver up possession to the receiver, *Griffith v. Griffith*, 2 Ves. Sen. 401. Where the property is in the possession of tenants the order usually directs them to attorn and pay their rents in arrear, as well as the growing rents, to the receiver, *Simmons v. Ld. Kinnaird*, 4 Ves. 747. The receiver should apply to the tenants to attorn, and if any of them refuse, the party obtaining the appointment of the receiver should serve them with a copy of the order granting the receiver and of the certificate of his appointment, and with a notice of motion for an order that they do attorn within four days after service of the order, or stand committed, *Reid v. Middleton*, T. & R. 455; and the Court will order the

tenants to pay the costs of this motion, *Hobson v. Sherwood*, 19 Beav. 575; but see *Hobhouse v. Holcombe*, 2 DeG. & Sm. 208.

Any attempt to disturb the possession of the receiver, without the leave of the Court being first obtained, is a contempt on the part of the person making it, *Angel v. Smith*, 9 Ves. 335; *Russell v. East Anglian Rail Co.* 3 Mac. & G. 104; and this rule extends to cases in which the receiver is appointed without prejudice to the right of persons having prior estates; and see *Bank of British North America v. Heaton*, 1 Cham. R. 175. If such persons wish to avail themselves of their right, they must apply to the Court either for liberty to bring ejectment, or in the mode now substituted for the old examination *pro interesse suo*, *Bryan v. Cormick*, 1 Cox. 422; even though their right to possession is clear, *Anon.*, 6 Ves. 287; and even although the order appointing the receiver is erroneous, *Ames v. Birkenhead Dock Trustees*, 20 Beav. 332.

The receiver's salary is generally fixed upon the passing of his first account, when he is allowed in his discharge a per centage upon his receipts by way of salary for his care and trouble. The usual per centage upon rents and profits of real estate is five per cent. on the gross rental; but this is the *maximum*. He may be entitled to allowances beyond his salary for any extraordinary trouble or expense he has been put to in the performance of his duty, *Potts v. Leighton*, 15 Ves. 276; but the Court will not sanction such allowances, if objected to, unless he has had the previous approbation of the Court for what he has done, *Re Ormsby*, 1 B. & B. 189; *Malcolm v. O'Callaghan*, 3 M. & C. 52; *Bristow v. Needham*, 2 Phill. 190; and see *Simpson v. Ottawa and Prescott Rail. Co.* 1 Cham. R. 937.

After tenants have attorned or paid rents to the receiver, he may distrain for rent in arrear; and he may in the case of a tenant from year to year, who has attorned, give notice to determine the tenancy, *Doe v. Read*, 12 East, 59; but he cannot bring ejectment without the sanction of the Court, *Wynne v. Ld. Newburgh*, 1 Ves. 164.

Where a receiver finds it necessary to sue for debts due an estate, an application for permission to do so must be made, supported by affidavits shewing the expediency of such proceedings, *Thomas v. Torrance*, 1 Cham. R. 9.

It is the duty of a receiver to pass his accounts regularly in the manner prescribed by the order under which he is appointed, and if he does not, he may be deprived of his salary, and charged with interest on the balance in his hands, *Ward v. Swift*, 8 Hare, 139.

If a receiver does not bring in his accounts at the proper time, the party desiring them to be brought in may claim a warrant for that purpose, and upon default he may have an attachment against the receiver. When the receiver brings in his accounts, but does not proceed upon them, the party prosecuting the decree takes out a warrant to proceed upon the accounts and serves all necessary parties; if the receiver does not attend on the return of the warrant to support his accounts, the Master allows

all the sums with which he has charged himself, and disallows his payments for want of being vouched, *Bertie v. Ld. Abingdon*, 8 Beav. 53.

To enforce payment of the balance reported due, an order should be obtained upon notice, for him to pay the amount within a given time, *Davies v. Cracraft*, 14 Ves. 143; and if the order be not complied with, a writ of *fi. fa.* may be issued, and the recognizance or bond put in suit. An order must be obtained for leave to sue upon the bond, and if the sureties are to be proceeded against, notice of motion must be served upon them, *Ludgater v. Channell*, 15 Sim. 479.

The sureties for a receiver cannot be discharged at their own request, *Griffith v. Griffith*, 2 Ves. Sen. 400; *Gordon v. Calvert*, 2 Sim. 253; but this rule will yield to circumstances, as where underhand practice is proved, and the person secured is shewn to be connected with it, *Hamilton v. Brewster*, 2 Moll. 407. On moving to vacate a receiver's recognizance, motion must be given to all parties, *Brown v. Perry*, 1 Cham. R. 253. With respect to the sureties' liability, it extends to all the receiver would be liable to pay, *Dawson v. Raynes*, 2 Russ. 466.

Unless a receiver is expressly continued by the decree, an appointment previously made will be superseded by the decree, *Gibson v. Ld. Montfort*, 1 Ves. Sen. 485.

Where a surety of a receiver dies pending the suit, the receiver may obtain, *ex parte*, an order referring it to the Master to approve of a new one, *Baldwin v. Crawford*, 1 Cham. R. 284.

Where a receiver made an investment unauthorized by the Court, by which a profit was made, the amount realized was directed to be allowed to the principal, *Baldwin v. Crawford*, 2 Cham. R. 9.

XXII.—INJUNCTIONS.

284. No injunction to stay proceedings at law is to be granted, for default of an answer to the bill; but such injunction may be granted upon an interlocutory application, in like manner as other special injunctions are granted. (3rd June, 1853; Ord. 27, s. 1.)

Under this section the plaintiff is to have an injunction, not as of course, but only on an affidavit of merits, *Senior v. Pritchard*, 16 Beav. 473; *Magnay v. Mines Royal Co.*, 3 Drew. 130; and to entitle the plaintiff to the injunction, he must himself depose to the facts within his own knowledge, and that he believes the other statements on which he relies to be true, *Mollett v. Enequist*, 25 Beav. 609; but where the plaintiff is abroad, the affidavit may be made by his agent, *Whitelegg v. Whitelegg*, 1 Bro. C. C. 57; *Lord Byron v. Johnston*, 2 Mer. 29. Where plaintiff had replied at law to equitable pleas, injunction was refused, *Farebrother v.*

Welchman, 3 Drew. 122; and where a defendant in an action at law filed a bill to restrain proceedings, alleging as grounds for relief, facts which, if they had been properly pleaded, would have afforded a good defence at law, the Court, without enquiring as to the merits of the case, dismissed the bill, *Morrison v. McLean*, 7 Grant, 167.

A motion for injunction will be refused where the allegations and prayer of the bill have been framed for relief on other grounds than those upon which the application is founded, although the affidavits in support of the motion, contain sufficient to warrant the Court in granting an injunction, *Ely v. Wilson*, 7 Grant, 103.

A motion for injunction held abandoned by amending the bill pending the motion, *Monypenny v. Dering*, 1 W. R. 99; *Westacott v. Cockerline*, 13 Grant, 159; *McDonell v. Street*, 13 Grant, 168; but see *Hawes v. Bamford*, 9 Sim. 653.

If a plaintiff obtains an order to amend after obtaining an injunction, such order will be *prima facie* without prejudice to the injunction, *Kennedy v. Lewis*, 14 Jur. 166; *Evans v. Root*, 1 Cham. R. 357; and the order need not contain the words "without prejudice," in order to save the injunction, nor will the insertion of these words preclude the defendant from moving to dissolve the injunction in a proper case, *e. g.* if the plaintiff by amendment has changed the record, *Attorney-General v. Marsh*, 16 Sim. 572; or broken the terms of an agreement, *Clarke v. Clarke*, 13 W. R. 133; and see *Harding v. Tingey*, 12 W. R. 703.

Amendments of a material character not allowed without prejudice to a pending motion for injunction, *Davy v. Davy*, 2 Cham. R. 81.

Where motion for an injunction is refused, the proper course is not to give the costs, as, if the suit fails, the plaintiff must pay the costs, and if it succeeds, the order at the hearing provides for the payment of them, *Carruthers v. Armour*, 7 Grant, 34.

In a proper case, upon a petition by the defendant, the Court granted an injunction against the plaintiff, *Bartels v. Benson*, 9 Grant, 486; but the answer must pray an injunction, *Brandon v. Elliott*, 14 Gr. 109; in special cases a defendant may restrain a co-defendant, *Edgecumbe v. Carpenter*, 1 Beav. 171; *Kingham v. Maisey*, 2 Sim. 41.

Where in a foreclosure suit an injunction has been granted to restrain the cutting of timber, the Registrar cannot issue a decree under order 435 or 436, continuing the injunction, *King v. Freeman*, 1 Cham. R. 350. After a decree of foreclosure, if the mortgagor commits waste, the Court will enjoin him, though an injunction may not have been prayed for in the bill, *Cawthra v. Maguire*, 5 M. L. J. 142.

In cases of immediate urgency an *ex parte* injunction, or an interim restraining order may be obtained; but such an application must be made without laches, delay in asking for injunctions being regarded by the Court with more than ordinary jealousy, *Wintle v. Bristol Rail. Co.*, 10 W. R. 210.

Generally a plaintiff obtaining an *ex parte* injunction or interim order, is required to give an undertaking as to damages, *Adamson v. Wilson*, 10 L. T. N. S. 24; *Chappell v. Davidson*, 8 D. M. & G. 1; and see *Wakefield v. Duke of Buccleugh*, 13 W. R. 856.

The plaintiff being abroad his counsel entered into the undertaking, *Hamilton v. Board*, 1 N. R. 379; and a company being plaintiff, some responsible person was required to enter into the undertaking, *Anglo-Danubrian Co. v. Rogerson*, 10 Jur. N. S. 87.

The dismissal of the bill does not affect the ultimate decision as to the damages to be paid under an undertaking given when an interim injunction was obtained, *Newby v. Harrison*, 8 D. F. & J. 237; overruling S. O. 1 J. & H. 678. But where a plaintiff had obtained an *ex parte* injunction on the usual undertaking to be answerable in damages, and after the injunction had been dissolved, the defendant moved to dismiss the bill for want of prosecution, and for an enquiry as to damages, the Court made an order to file replication, or else that the bill should be dismissed, but issued in that state of the proceedings to direct an enquiry as to damages, *Southwood v. Taylor*, 28 Beav. 616.

The undertaking does not extend to damages which result not from the injunction but collaterally from the suit, *Bingley v. Marshall*, 11 W. R. 1018.

A plaintiff cannot obtain an injunction pending a demurrer, *Cousins v. Smith*, 13 Ves. 164; or after a bill has been found to contain scandalous matter, *Davenport v. Davenport*, 6 Mad. 251.

A successful demurrer to the whole bill puts an end to an injunction previously obtained, even though leave be given to amend, *Schneider, v. Lizardi*, 9 Beav. 461.

A plaintiff's right to an injunction at the hearing, is not necessarily prejudiced by his omitting to apply for it at an earlier stage of the cause, *Davey v. Marshall*, 1 Dr. & Sm. 557; but see *Betts v. Clifford*, 1 J. & H. 74.

The abatement of a suit does not of itself dissolve an injunction, *Hill v. Hoare*, 2 Cox. 50; *Stuart v. Ansell*, 1 Cox. 411.

If an injunction is improperly obtained, the party restrained should move to dissolve it, he cannot treat it as a nullity, *Woodward v. Earl of Lincoln*, 8 Swanst. 626; *Notter v. Smith*, 1 Cham. R. 21.

An injunction operates from the date of the order, *Ratray v. Bishop*, 3 Mad. 220; and in pressing cases the plaintiff may, before the order has been drawn up, give the defendant notice of the fact that it has been obtained, and if there is no delay in getting the order drawn up, sealed, and served, the defendant may be committed for a breach after such notice, *Vanandau v. Rose*, 2 J. & W. 264; *Kimpton v. Eve*, 2 V. & B. 349; *Lewes v. Morgan*, 5 Price, 518.

The copy of the injunction must be personally served, *Ellerton v. Thirsk*, 1 J. & W. 376.

After a breach the plaintiff may move either that the defendant be at once committed, or that he may be committed unless he shew cause to the contrary. The service of the notice of motion to commit, or of the order nisi must be personal, *Angerstein v. Hunt*, 6 Ves. 488; *Durant v. Moore*, 2 R & M. 83; unless it be satisfactorily made out that the defendant is purposely keeping out of the way, in which case substituted service may be permitted, *Pulteney v. Shelton*, 5 Ves. 147.

The order for committal must state the affidavit of service of the injunction, and either the affidavit of the service of the notice of motion for committal, or the appearance of counsel on the motion, *Stephens v. Workman*, 1 N. R. 563.

The affidavit of service need not state that the writ was under the seal of the Court, *Farwell v. Wallbridge*, 3 Grant, 628.

285. On a motion to obtain or dissolve a special injunction, affidavits may be used either to support or contradict the answer. (3rd June, 1853; Ord. 27, s. 2.)

On a motion for an injunction against one defendant, the cross-examination of another defendant on his answer, was held inadmissible in reply to the affidavits filed in answer to the motion, where the defendant against whom the plaintiff moved had no notice of the cross-examination, or of the plaintiff's intention to read the depositions, *Curtis v. Dales*, 12 Gr. 244.

On moving for an injunction *ex parte*, the affidavits, on which the application is founded, must set forth all the facts and circumstances material for the Court to know, or the injunction will be dissolved: even although the party moving did not consider the circumstance material, *McMaster v. Callaway*, 6 Grant, 577; *Ley v. McDonald*, 2 Grant, 398; *Hilton v. Earl Granville*, 4 Beav. 130; or at any rate the plaintiff will have to pay the costs, *Fuller v. Taylor*, 11 W. R. 532; *Holden v. Waterloo*, 15 W. R. 139; and see *Fitch v. Rotchport*, 18 L. J. Ch. 458.

XXIII.—STOP ORDERS.

286. Where any stock, debentures, funds, securities, or moneys, are standing in Court to the credit of any cause, or to the account of any class of persons, or are invested in the name of the Registrar, or other officer of the Court, and an order is made to prevent the transfer or payment of such stock, debentures, funds, securities, or moneys, or any part thereof, without notice to the assignee of any person entitled in expectancy or otherwise

to any share or portion of such stock, debentures, funds, securities, or moneys, the person by whom any such order shall be obtained, or the share of such stock, debentures, funds, securities, or moneys affected by such order, shall be liable at the discretion of the Court or a Judge, as the case may be, to pay any costs charges and expenses, which by reason of any such order having been obtained, shall be occasioned to any party to the cause or matter, or any person interested in any such stock, debentures, funds, securities, or moneys. (*Eng. Con. Ord.* 26, r. 1.)

In cases where the assignor and assignee concur a stop order must be taken at Chambers, *Edmondson v. Harrison*, 1 W. R. 140; and see *Re Miller*, 6 W. R. 238; *Re Nowell*, 11 W. R. 896.

See generally as to the effect of a stop order, *Tidd v. Lister*, 15 W. R. 975; and as to its giving no priority over other charges, *Warbarton v. Hill*, Kay 470; *Greening v. Beckford*, 5 Sim. 195; *Swayne v. Swayne*, 11 Beav. 463; *Hulkes v. Davy*, 10 Sim. 41. By granting a stop order the Court decides nothing as to the rights of the parties, *Lucas v. Peacock*, 9 Beav. 177; *Hawkesley v. Gowan*, 12 W. R. 1100.

The Court has no jurisdiction to grant a stop order on a fund in Court, at the instance of a judgment creditor of the party entitled to the fund, *Lee v. Bell*, 2 Cham. R. 114; *Purkiss v. Morrison*, 2 Cham. 117.

A prospective stop order was granted by V. C. Kindersley, in *Re Duke of Cleveland's Haris Estates*, 17th January, 1862, restraining the funds hereafter to be paid into a particular account; but where there was no certainty that any fund would be brought into Court, a prospective order would be referred, *Wellesley v. Mornington*, 11 W. R. 17.

The order for payment out of a fund in Court of the claim of a person who has obtained a stop order, should include the costs of obtaining a stop order, otherwise they will be disallowed, *Waddilove v. Taylor*, 6 Ha. 307.

See further as to the costs of a stop order, and the appearance of persons who have obtained one, *Edwards v. Grove*, 29 L. J. Ch. 839; *Grimsby v. Webster*, 8 W. R. 725.

287. A person applying for such order, shall not be required to serve notice thereof upon the parties to the cause, or upon the persons interested in such parts of the stock, debentures, funds, securities or moneys, as are not sought to be affected by the order. (*Eng. Con. Ord.* 26, r. 2.)

This order does not dispense with the necessity of serving the assignor though a party to the cause, *Parsons v. Grooms*, 4 Beav. 521; but where not only the assignor but the other parties to the cause were served, the petitioner was ordered to pay the costs of the latter, *Glasbrook v. Gillatt*, 9 Beav. 611.

As to the evidence necessary on an application under the order, see *Wood v. Vincent*, 4 Beav. 419; *Quarman v. Williams*, 5 Beav. 133.

XXIV.—PROCESS.

288. If a party who is ordered, otherwise than by an order of course, to do any act, other than to pay money, in a limited time, refuses or neglects to obey the order according to the exigency thereof, the party prosecuting the order shall, at the expiration of the time limited, upon filing [with the Registrar] an affidavit of the service of the order, and of the non-performance thereof, be entitled, upon precipe, to a writ or writs of attachment against the disobedient party. (3rd June, 1853; Ord. 46, s. 2.

The words, "with the Registrar," are struck out by order 650.

This order differs from that of 3rd June, 1853, by being limited to disobedience of special orders of the Court, and in being inapplicable to cases where the act ordered to be done is payment of money.

A warrant to the Sheriff to commit a party is not irregular, though no return day is mentioned in it, *Prentiss v. Brennan*, 1 Grant, 497.

On a motion to commit for breach of an injunction, it is not necessary for the affidavit to state that the writ was under the seal of the Court *Farwell v. Wallbridge*, 3 Grant, 628.

A married woman, defendant, living with her husband, was ordered to bring certain accounts, as administratrix, into the Master's office, and having disobeyed the order, an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shews some ground of exemption, *Maughan v. Wilkes*, 1 Cham. R. 91.

An attachment to commit a man for contempt will not be granted merely for non-payment of the costs of the contempt, *Dickson v. Cook*, 1 Cham. R. 210; but where a party in contempt to an attachment for not bringing accounts into the Master's office, filed the accounts, but did not pay the costs of the proceedings to put him in contempt, a motion to take the account off the files that the process of contempt might be proceeded with was granted, *Corbett v. Meyers*, 1 Cham. R. 26.

The Court will not detain a person in gaol merely for the non-payment of money, but in order to punish any one who has been guilty of a con-

tempt it may imprison him for a stated period, allowing him to be discharged if he pays the costs of the contempt before the expiration of such period, *Harris v. Meyers*, 1 Cham. R. 229.

It is improper to have recourse to an attachment when the object sought can be attained without such process, *Mason v. Seoney*, 2 Cham. R. 220.

A party in contempt cannot take any step in the cause until he has cleared his contempt, but he may move to discharge an order made against him adversely, *Fulvoys v. Kennard*, 2 Giff. 110; or shew that subsequent proceedings are irregular, *King v. Bryant*, 3 M. & C. 191; *Morrison v. Morrison*, 4 Hare, 590.

As to the Sheriff's liability for an escape, see *Harkin v. Rabidon*, 1 Cham. R. 133.

289. In case the party shall be taken or detained in custody under the writ of attachment, without obeying the order, then upon the Sheriff's return that the party has been so taken or detained, the party prosecuting the order shall be entitled, upon precipe, to a commission of sequestration against the estate and effects of the disobedient party. (3rd June, 1853; Ord. 46, s. 2.)

Property seized under a writ of sequestration cannot be sold without an order for that purpose previously obtained upon motion, *Forbes v. Connolly*, 1 Cham. R. 6. Where property seized under a sequestration is claimed by a third party, the Court may direct an enquiry as to the ownership, *Re Brennan*, 2 Grant, 274.

The tenant of a party against whom the sequestration has issued, will be ordered to pay to the Commissioner rent shewn to be due, and also to attorn and pay the accruing rents, *Jackson v. Jackson*, 1 Cham. R. 115.

As to when choses in action are bound by a sequestration, see *McDowell v. McDowell*, 1 Cham. R. 140.

290. If an attachment cannot be executed against the party refusing or neglecting to obey the order, by reason of his being out of the jurisdiction of the Court, or of his having absconded, or that with due diligence he cannot be found, and the Court is satisfied by affidavit that such is the case, the party prosecuting the order shall be entitled to an order for a commission of sequestration against the estate and effects of the disobedient party; and it shall not be necessary for that purpose to sue out an attachment. (3rd June, 1853; Ord. 46, s. 3.)

291. If a party who is ordered to pay money, neglects to obey the order according to the exigency thereof, the party prosecuting the order, may, at the expiration of the time limited for the performance thereof, apply in Chambers for a writ of sequestration against the defaulting party, and upon proof of due service of a notice of the motion, unless the Court thinks proper to dispense with such service, and upon proof by affidavit of such other matters, if any, as the Court requires, the Court may order a writ of sequestration to issue.

292. Commissions of sequestration are to be directed to the Sheriff, unless otherwise ordered. (3rd June, 1853; Ord. 46, s. 4.)

293. Every order requiring a party to do an act, other than the payment of money, shall state the time after service of the order within which the act is to be done; and upon the copy of the order served, there shall be endorsed a memorandum in the words, or to the effect set forth in schedule N. (3rd June, 1853; Ord. 46, s. 6.)

294. It shall not be necessary to issue a writ of attachment or injunction upon an order for delivery of possession, but the party prosecuting the order, upon filing with the Clerk of Records and Writs an affidavit of service of the same, and of non-compliance therewith, shall be entitled without further order to a writ of assistance. (3rd June, 1853; Ord. 46, s. 8.)

The affidavit in support of an application for a writ of assistance need not shew an existing non-compliance, but only non-compliance with the terms and order to be enforced, *Webster v. Taylor*, 18 Jur. 869.

As to delivery of possession in mortgage cases, see Ord. 464.

295. In lieu of an order *nisi*, notice is to be given of the motion for an order absolute. (6th Feb. 1865; Ord. 31.)

A notice of motion for an order absolute must be served four ~~days~~ days, *Kelly v. Smith*, 1 Cham. R. 384; *Gray v. Hatch*, 2 Cham. R. 12; it is not necessary to state in the notice of motion that a certificate of an officer of the Court will be read; such certificate can be read though no notice is given, *Malloch v. Plunkett*, 1 Cham. R. 381; the certificate should bear the latest possible date, *Somerville v. Joyce*, 1 Cham. R. 202.

Where the order is complied with after service of the notice of motion to commit, and before the motion comes on, the order to commit will not be granted, but the party will be required to pay the costs of the motion within twenty-four hours after their amount has been settled, *Berrie v. Moore*, 1 Cham. R. 107; *Malloch v. Plunkett*, 1 Cham. R. 381.

The Court will not grant an order nisi against a person not a party to the suit, *Harris v. Meyers*, 1 Cham. R. 262.

296. Where the application for such order is made, by reason of default in production of books and papers in the Master's office, or in the office of the Clerk of Records and Writs, or in carrying in accounts, service of the notice of motion upon the solicitor of the party required to obey the same, is to be sufficient service.

Before this order, service on the solicitor of a notice of motion to commit for non-production in the Master's office was good service, *Gourlay v. Riddell*, 2 Cham. R. 158; but notice of motion to commit for non-production in the Registrar's office required personal service, *Dickson v. Dickson*, 1 Cham. R. 366.

297. Every person, not being a party in a cause, who has obtained an order, or in whose favor an order has been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party in a cause, against whom obedience to an order of the Court may be enforced, shall be liable to the same process for enforcing obedience to the order, as if he were a party to the cause. (3rd June, 1853; Ord. 46, s. 10.)

298. On the taxation of costs, no fees are to be allowed for the mileage or service of office-copies of bills, orders, subpoenas, warrants, notices of motion, or other proceedings, unless served, and sworn in the affidavit of service

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to have been served, by the Sheriff, his Deputy or Bailiff being a literate person.

299. Upon the delivery of an office-copy of a bill, order, subpœna, warrant, notice of motion, or other proceeding, at the office of any Sheriff, to be served by him, he, his Deputy, or Clerk is to note the time it was so delivered.

300. In case the office-copy of the bill, order, subpœna, warrant, notice of motion, or other proceeding, is not fully and completely served within fifteen days after such delivery, the plaintiff or defendant, his solicitor or agent, is to be entitled to receive the same back, and the Sheriff, Deputy Sheriff, or Clerk shall therewith return a note of the time when the same was received, and the time of re-delivery, and on the taxation of costs, the costs of the mileage and service of the office-copy of the bill, order, subpœna, warrant, notice of motion, or other proceeding, by any literate person, are to be allowed, as if the same had been served by the Sheriff or his officer.

301. If the Sheriff neglects or refuses to return any such office-copy of a bill, order, subpœna, warrant, notice of motion, or other proceeding, after the expiration of the said fifteen days, the plaintiff or defendant may issue or prepare another office-copy of the bill, order, subpœna, warrant, notice of motion, or other proceeding, and the costs thereof and occasioned by the default of the said Sheriff, may be charged against, and recovered from the Sheriff by the plaintiff or defendant, or his solicitor; and the Sheriff in whose office any such proceeding is received for service, is to receive it subject to this liability.

302. No mileage shall be taxed or allowed for the service of any office-copy of a bill, order, subpœna, warrant, notice of motion, or other proceeding, without an affida-

vit being produced to the Taxing Officer, stating the sum actually disbursed and paid for such mileage, and the name of the party to whom such payment has been made.

See as to Sheriff's poundage, *Winters v. Kingston Permanent Building Society*, 1 Cham. R. 276; and as to Sheriff's liability for an escape, *Harkin v. Rabidon*, 1 Cham. R. 133.

303. The preceding orders are not to apply to services effected out of the jurisdiction, nor to services effected by a solicitor upon the opposite solicitor.

XXV.—COSTS.

304. Where the Court deems it proper to award costs to either party, it may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid. And the same may likewise be done upon such proceedings before the Court or in Chambers as have heretofore been matters of reference to the Master. (3rd June, 1853; Ord. 45, s. 1.)

The power of the Court to award a gross sum in lieu of costs by the order of June, 1853, limited to interlocutory applications.

The Court does not deal with the question of costs, where it does not adjudicate upon the subject matter of the suit, *Nicholls v. Elford*, 5 Jur. N. S. 264.

Where fraud is charged in the bill which the plaintiff fails to establish he will not be allowed costs, though he succeeds in the suit, *Hughson v. Davis*, 4 Grant, 588; *Engerson v. Smith*, 9 Grant, 16; and see *Blest v. Brown*, 10 W. R. 569. In *Neal v. Winter*, 9 Grant, 261, the Court ordered the plaintiff to pay costs although he succeeded in the suit.

As to costs of the Attorney-General and the Crown, see *Attorney-General v. Earl of Ashburnham*, 1 S. & S. 394; *Perkins v. Bradley*, 1 Hare. 219; *Kane v. Reynolds*, 24 L. J. Ch. 321; *Attorney-General v. Corporation of London*, 2 Mac. & G. 247; *United States v. Denton*, 2 Cham. R. 263.

Where no direction is given as to the costs of a motion; (1) The party making a successful motion is entitled to his costs, as costs in the cause; but the party opposing it is not entitled to his costs, as costs in the cause. (2) The party making a motion which fails, is not entitled to his costs, as costs in the cause; but the party opposing it is entitled to his costs,

as costs in the cause. (3) Where a motion is made by one party, and not opposed by the other, the costs of both parties are costs in the cause, *Mem. 1 S. & S. 357.*

If the costs of the motion are reserved until the hearing, care should be taken to ask for them then or they will not be allowed in taxation, *Gardner v. Marshall*, 14 Sim. 588; *Jones v. Batten*, 10 Hare, App. 11.

305. It shall also be competent for a Local Master, upon disposing of applications made to him under Order 36, in like manner to direct payment of a sum in gross in lieu of taxed costs, and to direct by and to whom such sum in gross is to be paid. (3rd June, 1853; Ord. 45. s. 1.)

The applications which a Local Master may dispose of under Order 36, are,—To appoint guardians ad litem for infants,—For time to answer or demur,—For leave to amend before replication,—To postpone the examination of witnesses, or to allow further time for the production of evidence,—For security for costs.

306. If upon the taxation of costs it should appear to the Master that any proceedings have been taken unnecessarily, and which were not calculated to advance the interests of the party on whose behalf the same were taken, it shall be the duty of the Master to disallow the costs of such proceedings, as well on the taxation of costs between solicitor and client, and as between solicitor and client, as on a taxation between party and party, unless the Master shall be of opinion that such proceedings were taken by the solicitor because they were in his judgment, reasonably exercised, conducive to the interest of his client. It shall not be the duty of the Master, on a taxation of costs between a solicitor and his client, to disallow to the solicitor his costs of such proceedings where it is made to appear that such proceedings were taken by the desire of the client, after being informed by his solicitor that the same were unnecessary, and not calculated to advance the interests of the client; but the costs of such proceedings are not to be allowed in any case where, according

to the present practice and rules of taxation, the same would not be allowed. (3rd June, 1853; Ord. 45, s. 2.)

As to the powers of the Taxing Officer generally, see *Alsop v. Lord Oxford*, 1 M. & K. 564; *Re Congreve*, 4 Beav. 87; *Re Hubbard*, 23 Beav. 481; *Turner v. Turner*, 7 W. R. 573.

307. Where costs are to be taxed as between party and party, the Master may allow to the party entitled to receive such costs, the like costs as are taxable where costs are directed to be taxed as between solicitor and client, in respect of the following matters :

1. Advising with counsel on the pleadings, evidence, and other proceedings in the cause ;
2. Procuring counsel to settle and sign such pleadings and petitions as may appear to have been proper to be settled by counsel ;
3. Procuring and attending consultations of counsel ;
4. The amendment of bills ;
5. On proceedings in the Master's office ;
6. Supplying counsel with copies of or extracts from necessary documents. (3rd June, 1853; Ord. 45, s. 3.)

308. In allowing such costs, the Master is not to allow the party any costs which do not appear to have been necessary or proper for the attainment of justice, or for the defending his rights; or which appear to have been incurred through over-caution, negligence or mistake, or merely at the desire of the party. (3rd June, 1853; Ord. 45, s. 3.)

309. The fees and disbursements set forth in the Tariff

annexed to these Orders, may be charged in respect of the services therein enumerated.

310. No bill of costs where the amount claimed exceeds thirty dollars is hereafter to be taxed by the Accountant, Registrar, or Judges' Secretary, but every bill exceeding that sum is to be taxed by the Taxing Officer, notwithstanding anything to the contrary contained in the order. (1st April, 1867; Ord. 16.)

311. Every Local Master is forthwith, after taxing a bill of costs, to transmit the same by mail to Toronto, addressed "To the Taxing Officer of the Court of Chancery, Toronto," and he is to allow in the bill the postage for the transmission and return of the bill, and shall prepay the same; and is to allow in the bill the sum of one dollar as a fee for the revision of the bill by the Taxing Officer at Toronto, and a law stamp for that sum, with postage stamps for the postage, is to be paid at the time of taxation by the party procuring the bill to be taxed; and the Local Master is to transmit with the bill to the Taxing Officer at Toronto, the law stamp, and the necessary stamps for postage on the return of the bill to the Local Master. (6th Feb. 1865; Ord. 37.)

312. The Taxing Officer at Toronto, upon receiving the bill of costs, is to examine the same, and to mark in the margin such sums (if any) as may appear to him to have been improperly allowed, or to be questionable; and he is to revise the taxation, either *ex parte*, or upon notice to the Toronto agent (if any) of the solicitor whose bill is in question, as in his discretion he may see fit; but notifying such agent (if any) in all cases where the taxation is not clearly erroneous, or where the amount in question is so large as in the judgment of the Taxing Officer, to make such notification proper. Such notification may be by appointment mailed to the address of the

agent (if any). If upon the revision the sums disallowed shall amount to one-twentieth of the amount allowed upon taxation, the Taxing Officer is to add to the amount taxed off, the amount of postages, and the sum of one dollar aforesaid, and is thereupon to re-transmit the bill so revised to the Local Master. (6th Feb. 1865; Ord. 38.)

313. No sum is to be inserted in the report of a Local Master as taxed and allowed for costs, until such revision by the Taxing Officer; but in a case of urgency, a writ of execution may issue to levy debt or costs, or both, upon the order of a Judge, subject to the future revision by the Taxing Officer. (6th Feb. 1865; Ord. 39.)

A Local Master in making his report, is not at liberty to date it until the costs taxed by himself have been finally revised, and settled by the Taxing officer, *Waddell v. McColl*, 14 Grant, 211.

314. Where a guardian *ad litem* is appointed on the application of the plaintiff, to an infant, or to a person of unsound mind, not so found by inquisition, no costs are to be taxed to the guardian; but in lieu thereof, the plaintiff is to pay to the guardian a fee of fifteen dollars, and his actual disbursements out of pocket; and the plaintiff in case he is allowed the costs of the suit, is to add to his own bill of costs the amount he so pays. But the Court may, in special cases, direct the allowance of taxed costs to a guardian *ad litem*. (1st April, 1867; Ord. 18.)

315. Where two or more defendants defend by different solicitors under circumstances that, by the law of the Court, entitle them to but one set of costs, the Taxing Officer, without any special order from the Court, is to allow but one set of costs; and if two or more defendants defending by the same solicitor separate unnecessarily in their answers, or otherwise, the Taxing Officer is, with-

out any special order of the Court, to allow but one answer and set of costs. (1st April, 1867; Ord. 17.)

316. Where costs are awarded to be paid, it shall be competent to the Taxing Officer to tax the same, without an express reference to him for that purpose. (29th June, 1861.)

317. Where in a suit for administration, or partition, or partition and sale, the Master finds that the costs amount to twenty-five per cent. of the value of the property involved in the suit, he is to certify to the Court the amount of the costs, and the special circumstances, if any, connected therewith.

318. Where an order directs the plaintiff's costs to be taxed, and the Master finds that the suit is one within the jurisdiction of the County Court, he is not to tax any costs under the said direction, unless the order contains a declaration that in the opinion of the Court, the cause is a fit and proper cause to be brought in this Court instead of the County Court.

If any suit or proceeding be commenced in the Court of Chancery for any cause or claim which might have been entered in a County Court, no costs shall be taxed against the defendant in such suit or proceeding, and the defendant, if he succeeds in the suit, shall be entitled to a decree against the plaintiff for his costs, as between attorney and client, unless the Court of Chancery be of opinion that it was a fit cause or claim to be withdrawn from a County Court and entered in the Court of Chancery, *Con. Stat. U. C. c. 15, s. 63.*

Before this order it was held that where the Master was directed by a decree to tax the costs of the suit, he had no jurisdiction to decline taxing them if he found that the suit might have been brought in the County Court, *McLeod v. Millar*, 12 Gr. 194.

Where a plaintiff filed his bill in the Court of Chancery to foreclose a mortgage within the jurisdiction of the County Court, he was refused his costs, the fact that the defendant is resident in another County than that in which the land is situate being no reason for resorting to the Court of Chancery, *Connell v. Curran*, 1 Cham. R. 11; but the necessity for obtaining an order for substitutional service is a sufficient reason for filing a

bill in Chancery, *Seath v. McIlroy*, 2 Cham. R. 93; or where the defendant is a resident out of the jurisdiction, *Lawrason v. Fitzgerald*, 9 Grant, 371; or where the defendants live in different Counties, *McLeod v. Millar*, 12 Grant, 194. Where the bill is filed in respect of a demand exceeding £50 the plaintiff should proceed in Chancery, if there is a subsequent incumbrance exceeding that sum, *Hyman v. Roots*, 11 Grant, 202; *Seath v. McIlroy*, 2 Cham. R. 93.

319. Where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by the one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff. (20th Dec. 1865; Ord. 18.)

320. In the case of an appeal from a Master's report, the Court may give the costs of the appeal, or any part thereof, to a successful appellant. (20th Dec. 1865; Ord. 36.)

Where an appeal from a report failed on the main point, and succeeded only in respect of a small sum, the Court gave the respondent the costs of the appeal, *Brownlee v. Cunningham*, 13 Grant, 586. Where in an appeal some of the objections are allowed with costs, and some are disallowed with costs, the appellants are entitled to all the costs of the appeal that are exclusively applicable to the objections allowed, and to a share of those costs common to all the objections according to, not the mere number of the objections as stated in the notice, but to the really distinct grounds of appeal, *Bank of Montreal v. Ryan*, 13 Grant, 204; the same rule applies to the respondents' costs, *Ibid*.

Where it was considered that the finding of the Master was, under the circumstances, a fit subject for discussion, the Court, although it dismissed an appeal, from the finding of the Master, did so without costs, *Secord v. Terryberry*, 14 Grant, 172.

321. Bonds executed upon an order for security for costs are to be given to the Registrar, or Deputy Registrar with whom the pleadings in the suit are filed; all the defendants are to be included in the same bond; and the penal sum to be inserted therein is to be fixed upon the application for security, by the Judge or Master who makes the order. (3rd June, 1853; Ord. 43, s. 6.)

If the plaintiff be resident out of the jurisdiction, the Court will, on the application of the defendant, order him to give security for the costs of the suit; but security will not be ordered unless the plaintiffs are out of the jurisdiction, *Walker v. Easterby*, 6 Ves. 612.

The mere circumstance of the plaintiff having gone abroad is not a sufficient ground for ordering security; it must be shewn that he is resident abroad, or has gone abroad for the purpose of residing there, *Hoby v. Hitchcock*, 5 Ves. 699; nor will it be ordered where there is evidence of his intention to return, *White v. Greathead*, 15 Ves. 2; *Blakney v. Dufaur*, 2 D. M. & G. 771.

A plaintiff within the jurisdiction whose residence cannot be found, or who gives a fictitious address, will be ordered to give security, *Sandys v. Long*, 7 Sim. 140; 2 M. & K. 487; *Oldale v. Whitcher*, 5 Jur. N. S. 84; *Somerville v. Kerr*, 2 Cham. R. 163; a plaintiff frequently changing his abode was ordered to give security, *Player v. Anderson*, 15 Sim. 104; and security was ordered where plaintiff described himself as of a particular place, but was proved to have no fixed residence, *Calvert v. Day*, 2 Y. & C. Ex. 217; but the recent act, 22 Vic. c. 33, has effected a material change in the practice of the Court, as to granting or refusing security for costs. The fact that the plaintiff has not any fixed place of abode within the Province, will not be sufficient to warrant an order for that purpose, where it is shown that he has property within the jurisdiction, *White v. White*, 1 Cham. R. 48; *Gault v. Spencer*, 2 Cham. R. 92.

A plaintiff believed to have gone abroad to avoid payment, was ordered to give security, *Busk v. Beetham*, 2 Beav. 537; so a party only temporarily resident within the jurisdiction, *Ainslie v. Sims*, 17 Beav. 57; *Perrott v. Novelli*, 9 Jur. 770.

A British subject who has resided in the United States for several years, but had never taken any oath of naturalization, or exercised the rights of citizenship, returned to Canada, and after some months filed a bill; although several persons swore it was his intention to leave immediately on the decision of the case, yet a motion for security for costs was refused, the plaintiff swearing that it was his intention to remain in the country, *O'Grady v. Munro*, 7 Grant, 106; *Harvey v. Smith*, 1 Cham. R. 392; but see *Marsh v. Beard*, 1 Cham. R. 390.

Security ordered where the plaintiff's solicitor refused all information as to his residence, *Bailey v. Gundry*, 1 Keen. 58; but was not required where the plaintiff's address was a house unoccupied, but tenanted by him, *Manby v. Bewicke*, 1 Jur. N. S. 1015; nor, where he was not actually resident at the address stated, but there was no intentional misdescription, *Hurst v. Padwick*, 12 Jur. 21.

Mere intention to go abroad is no ground for requiring security, *Wyllie v. Ellice*, 11 Beav. 99. Security may be required where it appears upon the bill that the plaintiff, an officer in the royal service, is resident out of

the jurisdiction, unless it is distinctly stated in the bill that he is on actual service, *Lillie v. Lillie*, 4 M. & K. 404; or abroad in an official capacity, *Evelyn v. Chippendale*, 9 Sim. 497; *Clark v. Fergusson*, 5 Jur. N. S. 1155; 1 Giff. 184; and see *Dickenson v. Duffell*, 1 Cham. R. 108; 8 U. C. L. J. 326.

A plaintiff seeking to restrain an action at law to which he is a defendant, cannot be compelled to give security, *Watteu v. Billam*, 3 DeG. & S. 516; notwithstanding the bill may ask for relief other than the injunction, *Manley v. Williams*, 1 Cham. R. 48.

A defendant resident out of the jurisdiction presenting a bill in the suit cannot be required to give security, *Cochrane v. Fearon*, 18 Jur. 568; but a person not a party petitioning must give security, *Atkins v. Cooke*, 5 W. R. 381; *Partington v. Reynolds*, 6 W. R. 307; and so must a defendant obtaining the conduct of the cause, *Mynn v. Hart*, 9 Jur. 860. A creditor presenting a petition in an administration suit, was ordered to give security, *Drever v. Maudesley*, 5 Russ. 11.

A client resident abroad applying to tax his solicitor's bill, must give security for the costs of the proceeding, *Re Passmore*, 1 Beav. 94; and for what shall be found due, *Anon*, 12 Sim. 262.

An infant out of the jurisdiction petitioning for relief, must give security for costs, *Stinson v. Martin*, 2 Cham. R. 86.

The application for security should be made before the defendant files his answer. Filing an answer or asking further time to answer is a waiver of the right to security, *Melioruchy v. Melioruchy*, 2 Ves. Sen. 24; *Anon*, 10 Ves. 287; *Chapin v. Clark*, V. C. Esten, 28th June, 1859; but filing a demurrer is not a waiver, *Watteu v. Billam*, 3 DeG. & S. 516; nor is filing affidavits in opposition to a motion for an injunction, *Murrow v. Wilson*, 12 Beav. 497; nor in opposition to a petition, *Ex parte Seidler*, 12 Sim. 100.

Filing an answer, or asking further time, is no waiver if the plaintiff's residence appears from the bill to be within the jurisdiction, and the defendant is not aware that the address given is incorrect, *Swanzy v. Swanzy*, 4 K. & J. 237; but security was refused where the answer was filed after the plaintiff had gone abroad, though sworn before he had gone, *Dyott v. Dyott*, 1 Madd. 187.

If the plaintiff goes abroad after the suit is commenced, the application for security should be made promptly upon the defendant becoming aware of it, and before he takes any further active step; but appearing on a motion to pay money into Court, was held to be no waiver, *Cooper v. Purton*, 8 W. R. 702.

The next friend of a married woman must be a person of substance, otherwise an order will be made that a new next friend be appointed, or security for costs given, *Rann v. Lawless*, 1 Cham. R. 333; *Vanwinkle v. Chaplin*, 2 Cham. R. 95; *Leishman v. Eastwood*, 2 Cham. R. 88.

Where it appears upon the face of the bill that the plaintiff is resident abroad, the order may be obtained as of course upon precipe from the Registrar; or from a Deputy Registrar, *Ord.* 36; or on an *ex parte* application in Chambers. If it does not appear upon the bill, or if the application is made on account of the plaintiff going abroad or changing his residence, the order must be applied for in Chambers, upon notice supported by affidavit.

The order is of no effect until served. Where a precipe for an order for security was filed, and afterwards, on the same day, an order to take the bill *pro confesso* was obtained, a motion to set aside the order *pro confesso* was refused, *Chapin v. Clark*, V. C. Esten, 30th June, 1859.

The time usually allowed for giving security is the same as the plaintiff would, if a defendant resident abroad, have for answering. If the security be not given within the time limited by the order, the defendant may move in Chambers, upon notice, that the security be given within a limited time, or in default the bill to be dismissed, *Giddings v. Giddings*, 10 Beav. 29; and the time may be enlarged upon the plaintiff's application, *Wood v. Gray*, V. C. Esten, 2nd Dec. 1856.

The amount for which the bond is given is \$400, but the plaintiff may pay money into Court instead of giving security, *Cliffe v. Wilkinson*, 4 Sim. 122; as to payment out of the money, see *Luther v. Ward*, 2 Cham. R. 775.

The plaintiff is not bound to give two sureties, unless the defendant requires him to do so, but it is always prudent to give two. If there be only one surety, and he dies or becomes bankrupt, the Court, upon the application of the defendant, will stay proceedings until a new surety is appointed, *Lautour v. Holcombe*, 1 Phill. 263; *Veitch v. Irving*, 11 Sim. 122. If the defendant intends objecting to the bond, or to the sufficiency of the surety, he must do so within two days after he is served with notice of the filing of the bond, *Beaton v. Boomer*, Vankoughnet, C. 14th February, 1863.

The solicitor of the party cannot be his surety, *Panton v. Labertouche*, 1 Ph. 265; *Beckett v. Wragg*, 1 Cham. R. 5.

When the plaintiff is ordered to pay costs, the proper course is to serve the surety with the order, and demand payment, and on his refusing to pay, to move in Chambers for leave to sue on the bond, *Roaf v. Topping*, 1 Cham. R. 14; *Stokes v. Cryslar*, *Ibid.*

XXVI.—PROCEEDINGS TO REVERSE, ALTER OR EXPLAIN DECREES AND ORDERS.

322. A re-hearing may be had, as well after as before enrolment; but no second re-hearing is to be had, without leave of the Court granted upon special motion for the purpose. (3rd June, 1853; *Ord.* 9, s. 17.)

In a suit for the administration of a debtor's estate, under an assignment for the benefit of creditors, creditors who come in under the decree may re-hear the cause; and this is the proper course where the alteration sought is such as might be effected in that way by a party to the cause; *Mulholland v. Hamilton*, 12 Grant, 413.

Where a cause is re-heard by some of the defendants, and the decree affirmed as against them, other defendants who did not re-hear, cannot obtain any relief, although they appear at the re-hearing and ask for it, *Black v. Black*, 9 Grant, 403.

Proceedings in a Master's office under a decree are not stayed by a notice of re-hearing, *Campbell v. Campbell*, 1 Cham. R. 30.

If a petition of re-hearing is dismissed with costs the respondent is entitled to taxed costs, *Clarke v. Metcalf*, 21st Oct. 1862; but see *Price v. Dewhurst*, 4 M. & C. 282; *Phillips v. Phillips*, 8 Jur. N. S. 146.

323. Re-hearings of causes, and applications in the nature of re-hearings to discharge or vary orders made in Court, or in Chambers by a Judge, are to be in re-hearing term only, unless some special day be appointed by the Judge for the purpose. (28th April, 1862.)

324. Re-hearings of causes are to be within six months after the decree or decretal order has been passed and entered; and applications in the nature of re-hearings to discharge or vary orders made in Court, not being decretal orders, are to be within four months from the passing and entering of the same; or within such further time as the Court or a Judge may allow upon special grounds therefor, shewn to the satisfaction of the Court or Judge. (10th May, 1863; Ord. 1.)

The Court will, in a proper case, grant leave upon terms to re-hear a cause, though the usual time therefor has elapsed, *Winters v. Kingston Permanent Building Society*, 1 Cham. R. 214; *Stevenson v. Nichol*, 2 Cham. R. 183.

325. Where a decree or order is not passed or entered, within one month from the day judgment is pronounced, the time allowed for re-hearing the cause, or varying or discharging the order, is to begin to run at the expiration of the month. (6th Feb. 1865; Ord. 26.)

326. No petition for re-hearing is to be presented, but a party desiring to re-hear a cause, is, after paying into Court a deposit of forty dollars, to set the cause down for re-hearing, and serve notice thereof.

327. Where a party seeks to vary part only of an order, he may, in the notice of re-hearing, state the part of the order which he seeks to vary. (6th Feb. 1865; Ord. 29.)

328. A defendant waiving all objection to the order to take the bill *pro confesso*, and submitting to pay such costs as the Court directs, may have the cause re-heard upon the merits stated in the bill. (3rd June, 1853; Ord. 14, s. 8.)

329. Motions to discharge or vary orders made by the Judges' Secretary under Order 17, are to be made within fourteen days, and are to be to a single Judge upon notice; unless a Judge gives leave to bring the same before the full Court in the first instance.

An appeal will not lie from an order made by the Judges' Secretary until it is signed and entered, *Gibb v. Murphy*, 2 Cham. R. 132. A party cannot use affidavits not used before the Judges' Secretary, or make a new case on an appeal, *Bank of Montreal v. Wilson*, 2 Cham. R. 117.

330. Any party entitled by the former practice to file a bill of review, praying the variation or reversal of an order, upon the ground of matter arising subsequent to the order, or subsequently discovered, or a bill in the nature of a bill of review, or a bill to impeach a decree on the ground of fraud, or a bill to suspend the operation of a decree, or a bill to carry a decree into operation, is to proceed by petition in the cause, praying the relief which is sought, and stating the grounds upon which it is claimed. (3rd June, 1853; Ord. 9, s. 18.)

It is not necessary to present a petition for leave to file a petition in the nature of a bill of review, *Duggan v. McKay*, 1 Cham. R. 380.

Bills of review were either bills for error of law apparent in the decree (which might be filed without leave,) *Trulock v. Robey*, 2 Phill. 395; (see observations on that case, *Green v. Jenkins*, 29 L. J. 505; 6 Jur. N. S. 515;) *Perry v. Philips*, 17 Ves. 173; *Tommey v. White*, 1 H. L. Ca. 160; *Gould v. Tancred*, 2 Atk. 533; or where material evidence or facts were discovered which could not have been used when the decree passed, in which case leave to file the bill was necessary, *Young v. Keighly*, 16 Ves. 348; *Cook v. Banfield*, 3 Swanst. 607; *Bennett v. Lee*, 2 Atk. 528; *Standish v. Radley*, 2 Atk. 177; *Hungate v. Gascoyne*, 2 Phill. 25. Such evidence or facts must not have come to the knowledge of the solicitor of the parties before the evidence closed in the former suit, *Norris v. LeNove*, 3 Atk. 35.

To sustain a bill of review, the error must be specifically assigned; it must be an error conflicting with some legal, equitable or statutory rule, not a mere error in judgment, *Green v. Jenkins*, 6 Jur. N. S. 515. On a bill of review, the party could not assign for error that any matters were decreed contrary to the proofs in the case, he could shew only, error apparent in the decree, or newly discovered matter, *Mellish v. Williams*, 1 Vern. 166.

331. The petition is to be verified by affidavit, and served upon the solicitors of all parties interested; and in case a party has no solicitor, then upon the party. (3rd June, 1853; Ord. 9, s. 18.)

Seven days' notice of the hearing must be given, *Ord.* 418.

332. Upon the copy of the petition served is to be endorsed the following memorandum or notice: "If you do not appear on the petition the Court will make such order on the petitioner's own shewing as shall appear just, in your absence; and if this petition is served personally you will not receive any notice of the further proceedings on the petition." (9th May, 1862.)

333. Upon the hearing of the petition, the Court may either make a final order, or direct the petition to stand over, with liberty to the parties interested in sustaining the decree to file a special answer to the same; and may make such order as to the production of further proof, and the manner thereof, and the further hearing of the

petition, as the Court deems meet. (3rd June, 1853; Ord. 9, s. 18.)

334. Where the reversal or variation of an order is sought upon new matter, such proof as would have been requisite upon a motion to file a bill of review must be supplied. (3rd June, 1853; Ord. 9, s. 18.)

335. An application to amend an order which has not been drawn up in conformity with the judgment pronounced, so as to make the same conformable thereto; and an application to correct, any other clerical mistake in an order, or an error arising from an accidental slip or omission, may be made in Chambers on petition, and the Court may grant the same, if under all the circumstances the Court sees fit. (20th Dec. 1865; Ord. 19.)

Where a necessary direction is omitted in a decree, the Court will amend it, though passed and entered, *Moffatt v. Hyde*, 6 U. C. L. J. 94; the proper mode of proceeding is by petition, *Ibid*.

An application to correct a clerical error in a decree or order, must as a general rule be made upon notice, *Rademhurst v. Reynolds*, 11 Grant, 521.

Where a decree erroneously made provision for the payment of certain legacies in priority to the provision made by the testator's will for his widow, an application by the widow to amend the decree was granted without costs, she not having raised the question of priority before the Court, and the plaintiff having taken out the decree without notice to her, *Eadie v. McEwen*, 14 Grant, 404.

336. Where an order as drawn up requires amendment in any other particular on which the Court did not adjudicate, the same may be amended in open Court on petition without a re-hearing, if under all the circumstances the Court deems fit. (20th Dec. 1865; Ord. 20.)

XXVII.—REVIVOR AND SUPPLEMENT.

337. Upon a suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or

transmission of interest or liability, on the part of a plaintiff or defendant by devise, bequest, descent, or otherwise, it shall not be necessary to exhibit a bill of revivor or supplemental bill, to obtain an order to revive such suit or an order to carry on the proceedings, but an order to the effect of the order to revive, or of the usual supplemental decree under the former practice of the Court, may be obtained upon precipe, upon an allegation contained in the precipe, of the abatement of the suit, or of the same having become defective, and of the change or transmission of interest or liability. (6th June, '862; Ord. 3.)

This order applies to abatement either before or after decree, 10 Hare, App. 72; but where a sole defendant dies before the bill is served upon him, there is no suit in Court, the plaintiff, therefore, cannot revive, and if he take out an order to revive under such circumstances it will be discharged with costs, *Watson v. Ham*, 1 Cham. R. 295.

Where the abatement is before decree, only the plaintiff can obtain the order; and a defendant or the representatives of a deceased defendant, can only move that the plaintiff do revive within a limited time, or in default that the bill be dismissed.

A creditor who in a creditor's suit has proved a defendant on the estate is considered a plaintiff for the purpose of reviving, *English v. Hayman*, 9 Hare, App. 88; *Lowes v. Lowes*, 2 D. M. & G. 784; even though the report allowing his debt is not signed, *Inchley v. Allsop*, 9 W. R. 649.

Where the suit abates after decree, any defendant who has an interest therein may serve on the plaintiff's neglecting to do so; but if a defendant desires not only to revive, but also to get the conduct of the suit, he must give notice of his motion, *Noble v. Stow*, 30 Beav. 512.

When the suit abates between the hearing and decree, judgment may be given without reviving, *Collinson v. Lister*, 20 Beav. 355; *Belsham v. Percival*, 8 Hare, 157; *Boucicault v. Delafield*, 12 W. R. 8. So a decree may be drawn up though the suit has abated since it was pronounced, *Willimott v. Ogelby*, Seton, 1139; and see *Rucker v. Scholfield*, 1 N. R. 180; *Beamish v. Pomeroy*, 1 Cham. R. 32; *Galbraith v. Armstrong*, 1 Cham. R. 33.

No abatement takes place when the deceased plaintiff was one of several co-plaintiffs representing a class under order 58, *Hinde v. Morton*, 2 H. & M. 368; where *Hall v. Olive*, 20 Beav. 575; *Smith v. Horsfall*, 24 Beav. 331; *Ure v. Lord*, 2 Dr. & Sm. 263, were not followed.

Where the plaintiff in an administration suit, who was beneficially entitled, died, and the estate was known to be insolvent, an order of revivor was made, dispensing conditionally with the presence of the plaintiff's representatives, *Lycester v. Norris*, 13 W. R. 201.

This order applies where the interest of a party to the suit is transferred by mere operation of law, as on the marriage of a female plaintiff or defendant, see *Rudge v. Weedon*, 4 DeG. & J. 216; and a sole female plaintiff entitled for her separate use, was allowed on her marriage the common order to revive by her next friend against her husband, *Trezevant v. Broughton*, 5 W. R. 517; so on the death of any party to the suit, and consequent transmission of his interest to his legal representative, *Ward v. Shakeshaft*, 1 Dr. & Sm. 607; *Flockton v. Slee*, 7 W. R. 393; *Fane v. Richards*, 11 W. R. 524.

Where the object of the party reviving the suit against executors is not only to cure the abatement, but to get the benefit of any amounts directed against the deceased party, and to continue them against his representatives, an order will be made on motion that the executors do admit assets, or in default that an account be taken, *Edwards v. Bailey*, 19 Beav. 457; *Cartwright v. Shepherd*, 20 Beav. 122; overruling *Dean & Chapter of Ely v. Edwards*, 22 L. J. Ch. 629.

On the bankruptcy of any party to the suit, the common order to revive against his assignee can be obtained, *Macdonald v. Macfarlane*, 6 W. R. 245; *Lash v. Miller*, 4 D. M. & G. 841; *Jackson v. Riga Rail Co.* 28 Beav. 75; and on the annulment of a bankruptcy, the suit can be revived by common law against the late bankrupt, *Mostyn v. Emmanuel* 5 N. R. 464.

On the lunacy of a plaintiff, his committee may revive by a common order, *Dangar v. Stewart*, 9 W. R. 266; *Timpson v. London and North Western Rail. Co.*, 11 W. R. 558.

To where a change of interest has taken place by a necessary party coming into existence during the pendency of the suit, *Fullerton v. Martin*, 1 Drew. 238; *Phippen v. Brown*, 1 Jur. N. S. 698; *Pickford v. Brown*, 1 K. & J. 643; and see *Jebb v. Tugwell*, 20 Beav. 461, where a supplemental order was made pending the interest of an infant born before decree, but by inadvertence, not made a party before decree, it appearing that it would be for his benefit.

The common order may be refused in cases where the revivor will alter the frame of the suit, e. g. where a co-plaintiff is placed in such a position that he ought to be a defendant, *Jervoise v. Clark*, 2 W. R. 337; where one of two creditors, plaintiffs in a creditor's administration suit, upon an abatement by the death of an executor of the testator, obtained letters of administration, *de bonis non* to the testator's estate, it was held that the suit could not be revived against him under this order, *Tate v. Leithead*, 9 Hare, App. 51; but see *Cresswell v. Bateman*, 6 W. R. 220;

and see also *Pedder v. Pedder*, 8 W. R. 15, where the defendant died, having appointed the plaintiff his executor. At first it was held in England that the corresponding section of the Statute (Imp. Act, 15 & 16 Vic. c. 86, s. 52.) did not apply where the interest of a sole plaintiff wholly determined, but latterly a more liberal construction has been put upon the section, *Eyre v. Brett*, 34 Beav. 441; *Colyer v. Colyer*, 1 L. R. Ch. 482; *Mallock v. Still*, 15 W. R. 293; *Hobson v. Seawood*, 15 W. R. 887; and see *Geddes v. Allan*, 1 Cham. R. 336.

Where the interest of a sole defendant determined by his death, the common order was made to revive against his devisee, *Earl of Durham v. Legard*, 34 Beav. 442.

Where in a mortgage suit the plaintiff died after being redeemed by a subsequent incumbrancer, it was held unnecessary to revive the suit, but that the incumbrancer might proceed to foreclose the mortgagor, *Coulson v. Sheehy*, 1 Cham. 216.

Where some proceedings have been taken in the suit in ignorance of the abatement, an order can be obtained directing that future proceedings shall be carried on against the new parties, see *Freeman v. Pennington*, 3 D. F. & J. 296; and the Court in such a case has jurisdiction to affirm past proceedings where the new parties consent, *Houston v. Briscoe*, 7 W. R. 394; *Smith v. Horsfall*, 24 Beav. 331; but no such order can be made except by consent, *Graham v. Davis*, 2 Cham. R. 187.

As a general rule there can be no revivor for costs after an abatement by death, *Morgan v. Scudamore*, 2 Ves. 312; *Andrews v. Lockwood*, 15 Sim. 153; whether the abatement be caused by the death of the party to pay or the party to receive the costs, *Jupp v. Gessing*, 5 Mad. 375; nor is this rule affected by the fact of the defendant being a corporate body, *Umpelby v. Waveney Valley Rail. Co.* 1 J. & H. 254; nor the fact that the bill specially prays costs, *Ibid*; nor that the party who has died without paying costs was one of several defendants, *Bowyer v. Beamish*, 2 J. & L. 238.

Where the party to whom costs were payable died before taxation, the Court (the suit not having been revived) refused with costs a motion that the Master might proceed with the taxation, *Robertson v. Southgate*, 7 Hare, 109; but the survivors of several defendants, against whom a bill has been dismissed with costs, to be taxed, and paid by the plaintiffs, are entitled to proceed with the taxation of their costs, notwithstanding the death of one of such defendants, without a revivor of the suit, and although the surviving defendants and the deceased, in his life time, had carried on a ~~cost~~ bill of costs for taxation, *Hunter v. Daniel*, 7 Hare, 281; but see *Malins v. Greenway*, 7 Hare, 391.

The exceptions to this rule are: (1.) Where the costs have been taxed, *Louten v. Mayor of Colchester*, 2 Mer. 113; overruling *Glenham v. Stutwell*, 1 Dick. 14; or the taxation has been postponed, on an undertaking

that the postponement shall be without prejudice, *Tucker v. Wilkins*, 7 Sim. 349. (2.) Where some obligation imposed on the party liable for costs remains to be executed, *Bowyer v. Beamish*, 2 J. & L. 240; *Johnson v. Peck*, 2 Ves. Sen. 465. (3.) Where the costs are ordered to be paid by the estate, *Jenour v. Jenour*, 10 Ves. 562; or out of a particular fund, *Kemp v. Mackrell*, 2 Ves. Sen. 579. (4.) Where the costs are ordered to be paid by an officer of the Court, *g. g.*, by a receiver, *Belagh v. Concanon*, Ll. & G. temp. Plunket, 355.

338. An office-copy of the order is to be served upon the party or parties who would be defendant or defendants to a bill of revivor or supplemental bill according to the former practice of the Court, and such order shall, from the time of service, be binding upon such party or parties, in the same manner in every respect as if the order had been regularly obtained according to the former practice of the Court, and the party or parties shall thereupon become thenceforth a party or parties to the suit. (6th June, 1862; Ord. 3.)

This order is a variation from the former order of 6th June, 1862, in requiring the copy served to be an office-copy.

The service should be on the defendants personally, but, when a defendant is out of the jurisdiction, an order may be obtained to substitute service on his solicitor, *Foster v. Menzies*, 10 Hare, App. 36; see *Scott v. Wheeler*, 13 Beav. 239; *Norton v. Hepworth*, 1 Mac. & G. 54.

Where a defendant becomes insolvent after the service of the bill upon him, but before the term for answering expires, and the suit is thereupon revived against the assignee in insolvency, it is necessary to serve the assignee with the bill as well as with the order to revive, or an order *pro confesso* cannot be obtained, *Smith v. Lines*, 1 Cham. R. 398.

339. It shall be open to the party or parties so served, to apply to the Court, within fourteen days after the service of the order, by motion or petition, to discharge the order on any ground which would have been open to him or them on a bill of revivor or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and pray-

ing the usual relief consequent thereon. (6th June, 1862; Ord. 3.)

The term of vacation is not reckoned in the computation of the 14 days, Ord. 408. The order being obtained *ex parte*, is liable to be objected to by any parties to the suit, *Jackson v. Ward*, 1 Giff. 30; and if obtained on a false statement of facts, will be discharged as irregular, *Bagnall v. Whitehead*, 30 Beav. 229; and see *Smith v. Gunn*, 2 Cham. R. 230.

340. If a party so served shall be under any disability other than coverture, the order shall be of no force or effect as against such party, until a guardian *ad litem* has been duly appointed for such party, and the period of fourteen days has elapsed thereafter. (6th June, 1862; Ord. 3.)

341. Upon every office-copy of an order of revivor served, there is to be endorsed a memorandum in the form or to the effect set forth in schedule N. (1st April, 1867; Ord. 14.)

342. Where an order to revive is served out of Ontario, the party served is to have the same time to apply to discharge the order, as a defendant has to answer a bill of complaint; but an application may be made for shortening the time, as in the case of answers to bills in like cases. (20th Dec. 1865; Ord. 37.)

343. Where the Court authorizes publication instead of service, the Court is at the same time to appoint such time for applying to discharge the order to revive as seems proper. (20th Dec. 1865; Ord. 38.)

344. Where a suit is defective by means of some imperfection in the bill, and not in consequence of an event arising subsequent to its institution, the Court may at any time permit an amendmeat of the bill in furtherance of justice, and on such terms as it thinks proper, for the purpose of altering the allegations in the bill, or putting new

matter in issue, as well as for the purpose of adding or striking out the names of parties, or of varying the relief prayed, or praying further relief. (3rd June, 1853; Ord. 9, s. 14.)

345. The order is to be applied for by motion, the notice of which is to state the required amendment, and to be served upon the parties, or their solicitors, unless dispensed with. (3rd June, 1853; Ord. 9, s. 14.)

346. Upon the motion the Court must be satisfied, by affidavit or otherwise, of the truth of the proposed amendment, and of the propriety of permitting it to be made at the particular stage of the cause, under all the circumstances. (3rd June, 1853; Ord. 9, s. 14.)

347. Upon pronouncing such order for amendment the Court is to give such order as to the future conduct of the suit in relation to answering such amendments, as also with regard to the evidence taken, and in all other respects, as the circumstances of the case may require. (3rd June, 1853; Ord. 9, s. 14.)

348. Where, in a case not provided for by Order 344, a plaintiff desires to state, or put in issue, facts or circumstances occurring after the institution of the suit, if the cause is otherwise in such a state as to allow of an amendment being made in the bill, such facts or circumstances may be introduced into the original bill of complaint by way of amendment. (20th Dec. 1865; Ord. 6.)

Not only facts which have occurred, but facts which have been discovered since the institution of the suit, may be introduced by amendment, *Bolton v. Ridsdale*, 2 W. R. 488.

A plaintiff whose title was defective at first, may not by amendment introduce matter to cure such defect, *Attorney-General v. Portreeve of Avon*, 11 W. R. 1050; *Godfrey v. Tucker*, 33 Beav. 280; nor may he add or strike out a prayer for relief after answer, *Butterworth v. Bailey*, 15

Ves. 358; *Lord Cholmondeley v. Lord Clinton*, 2 V. & B. 113; but see *Severn v. Fletcher*, 5 Sim. 457.

Nor can he introduce new charges or alter the nature of the suit by amendment, *Mollett v. Enequist*, 26 Beav. 466; *Denison v. Curtis*, 11 L. T. N. S. 671; *Horton v. Brocklehurst*, 29 Beav. 503; even though new parties are added by amendment, *Milligan v. Mitchell*, 1 M. & C. 433; *Gibson v. Ingo*, 5 Hare, 156; *Barlow v. McMurray*, 2 L. R. Eq. 420. If a plaintiff introduces such amendments he will have to pay such costs as have been occasioned by his irregular proceedings, *Mavor v. Dry*, 2 S. & S. 113; *Parker v. Nickson*, 4 Giff. 311; or the defendant may move that the amended bill may be taken off the files, or the amendments struck out the plaintiff paying the costs of the application, *Barlow v. McMurray*, 2 L. R. Eq. 420.

This order does not apply for the purpose of making persons parties who have become necessary parties in respect of new facts or charges of interest; this must be done by revivor, *Commerell v. Hall*, 2 Drew. 194; *Webb v. Wardle*, 11 Jur. N. S. 278; *Nicholson v. Gibb*, 2 W. R. 837; but a merely formal party, *e. g.*, the personal representative of the testator in the cause who has taken out administration since the bill was filed, may be added by amendment, *Beardmore v. Gregory*, 2 H. & M. 491; *Heath v. Lewis*, 2 W. R. 641; *Haldane v. Eckford*, 14 W. R. 306.

349. If the cause is not in such a state as to allow of the bill being amended, the plaintiff may state and put in issue such subsequently occurring facts and circumstances by filing a statement, either written or printed, to be annexed to the bill. (20th Dec. 1865; Ord. 7.)

A supplemental statement is rarely filed, for the bill can generally be amended before decree, and after decree Order 349 does not apply, *Commerell v. Hall*, 2 Drew. 194.

The same rules apply to a supplemental statement as to ordinary amendments. Thus, a suit cannot be revived against new parties by a supplemental statement, but only by order of revivor, *Heath v. Chapman*, 1 W. R. 244; *Heath v. Lewis*, 18 Beav. 527.

A defendant cannot file a supplemental statement any more than he can amend a plaintiff's bill, *Langdale v. Gill*, 1 Sm. & G., 24; even though he has the conduct of the suit, *Lee v. Lee*, 9 Hare, App. 91.

350. No such statement is to be filed unless accompanied by an affidavit that the matter thereof arose within two weeks next before the filing of such statement, or unless the Court otherwise order. A copy of the affidavit

isto be served with a copy of the statement. (20th Dec. 1865; Ord. 7.)

351. Proceedings by way of answer and otherwise, are to be had and taken on the statement so filed, as if the same were embodied in a bill; but the Court may make any order which it thinks fit for accelerating the proceedings thereunder in any manner that is just and practicable. (20th Dec. 1865; Ord. 8.)

XXVIII.—PAYMENT OF MONEY INTO AND OUT OF COURT.

352. Money ordered to be paid into Court by any person is to be paid into the Canadian Bank of Commerce, at Toronto, with the privity of the Registrar and in no accountant other manner. (10th Sept. 1866; Ord. 18.)

353. A person desiring to pay money into Court is to produce to the Ledger Clerk the order, if any, under which the same is payable, and is to file a precipe in the form set out in schedule O. (10th Sept. 1866; Ord. 19.)

354. The Bank, on receiving money to the credit of any cause or matter, is to prepare a receipt therefor in duplicate; and one copy is to be delivered to the party making the deposit, and the other is to be posted or delivered the same day to the Ledger Clerk. (10th Sept. 1866; Ord. 20.)

355. Money is to be paid out of Court upon the joint cheque of the Registrar and Ledger Clerk, countersigned accountant by one of the Judges, and not otherwise. (10th Sept. 1866; Ord. 18.)

An order for payment of money out of Court will not be made *ex parte*, the party who has paid it in must be served with notice, *Bullen v. Renwick*, 1 Cham. R. 213.

accountant
356. The person entitled to a cheque is to produce and leave with the Ledger Clerk the orders and reports entitling such person to the money, and is to file a precipe in the form set out in schedule O. (10th Sept, 1866; Ord. 22.)

Initial
~~*accountant*~~
RJ
Registrar
357. If the Ledger Clerk finds the party entitled as mentioned in the precipe, he is to prepare and ~~sign~~ the cheque; and he is then to attend the Registrar with the cheque and the necessary papers; and the ~~Registrar~~ after examining the papers, and verifying the party's right to the cheque, is to add his signature after which the same is to be countersigned by a ~~Judge~~. (10th Sept. 1866; Ord. 23.)

358. The orders and reports produced as aforesaid, are to be re-delivered to the party entitled thereto, with the cheque. (10th Sept. 1866; Ord. 25.)

359. The following Account Books are to be kept, relating to money in Court, or invested under the authority of the Court :

1. A Book of Directions to the Bank to receive money;
2. A Book of Cheques;
3. A Money Journal;
4. A Money Ledger;
5. A Stock Journal;
6. A Stock Ledger;

7. A Balance Book ;

8. A Book as to the Mortgages and Investments, other than Dominion Stock, made under the authority of the Court. (10th Sept. 1866 ; Ord. 11.)

360. The Book of Directions and the Book of Cheques are respectively to be in the same form as hitherto, or in such form as the Judges from time to time direct or approve. The cheques are to specify in the body thereof the amount of interest, if any, payable therewith : and the directions and cheques are respectively to be numbered consecutively. (10th Sept. 1866 ; Ord. 12.)

361. The Money Journal is to shew the sums paid into and out of Court from day to day ; and is to be so arranged and kept that at the foot of each page will appear the total amount in the Bank, assuming all cheques to have been presented. (10th Sept. 1866 ; Ord. 13.)

362. The Money Ledger is to contain a separate account for every cause or matter in which there is money in Court ; and also the Suitors' Fee Fund Account, and the General Bank Interest account ; each of which accounts is to shew correctly the state and condition thereof for the time being. (10th Sept. 1866 ; Ord. 14.)

363. In each of the suitor's accounts there are, from time to time, to be entered the date, purport, or short material contents, of all orders and reports affecting the same ; also, every sum paid into and out of Court, and by whom paid, and for what paid, and under what authority. There is also to be credited to the account, the Bank interest computed or included in any order or report ; and a corresponding transfer of interest is to be made at the Bank, by cheque signed and countersigned as in other cases. There is likewise to be entered in the account a statement

or memorandum of any other matters material for the information of the Court or its officers, or of any of the parties. (10th Sept. 1866 ; Ord. 15.)

364. In the Stock Journal and Stock Ledger are to be entered all transactions relating to Dominion Stock, held or purchased by the Court for suitors, and all orders, reports, and other particulars as to the said Stock, in such manner as the Judges from time to time direct or approve.

365. The Balance Book is to contain a statement entered therein quarterly, of the balances at the credit of the various accounts in the two ledgers at the date of such statement, such balances are to be made up on the fifteenth of March, fifteenth of June, fifteenth of September, and fifteenth of December, of every year. The balances from the Money Ledger are to be so entered after a comparison of the accounts in the Ledger with the Bank's accounts ; which comparison is to be made by the Registrar and Ledger Clerk jointly, and the list thereupon entered in the Balance Book is to be signed therein by them. (10th Sept. 1866 ; Ord. 26.)

366. In the Book of Mortgage Investments, are to be entered, under the heading of the cause or matter in which any mortgage or other security has been taken by the order of the Court, the date and short material contents of such mortgage or security, and of all subsequent orders and proceedings in relation thereto, until such mortgage or other security is discharged by order of the Court. (10th Sept. 1866 ; Ord. 27.)

367. A list, signed by the Registrar and Ledger Clerk, of all the mortgages and securities, other than Dominion Stock, outstanding on the 1st January and 1st July, in each year is to be delivered to and left with the Judges within ten days thereafter, and such list is to set forth in convenient form :

1. The short style of the cause or matter ;
2. Date of order under which mortgage or other security executed ;
3. Date thereof ;
4. Amount ;
5. When payable ;
6. For whose benefit ;
7. What sums, if any, overdue for principal or interest ;
8. Name of mortgagor or party giving security ;
9. Locality (not description) of mortgaged property ;
10. Remarks. (10th Sep. 1866 ; Ord. 28.)

368. The books kept under these Orders are to be open to inspection ; and the Registrar is to give a certificate of the state of any account, or an extract therefrom, at the desire of any party interested, or his solicitor. (10th Sept. 1866 ; Ord. 29.)

369. Persons entitled to money in Court may have a sufficient amount of the unappropriated Dominion Stock standing in the Registrar's name, appropriated as an investment of such money, or of part thereof, at the current rate, but at not less than par.

370. If all parties interested consent in writing, the consent is to be filed with the officer having charge of the books, and he is to make the appropriation without an order being drawn up for the purpose, and is to enter the consent in the Stock Ledger, under the heading of the cause or matter, with the material contents of all or

ders necessary to shew who are interested in such account, and the shares in which they are respectively interested therein.

371. If there is no unappropriated stock applicable to the purpose, a direction, signed and countersigned in the same manner as a cheque, is to be delivered to the Bank, for the purchase to be made in the name of the Registrar; and when the purchase is made, a cheque is to be drawn for the amount, signed and countersigned as aforesaid, and like entries are to be made in the Stock Ledger.

372. The interest on stock so appropriated or purchased, is, each half-year, to be credited to the various accounts entitled thereto; and wherever interest is ordered to be paid from time to time to any person, he is to be entitled to receive a cheque therefor without further order.

373. Mortgages and other securities taken under an order of the Court, are to be taken in the name of the Registrar, unless the order directs the security to be taken in the name of some other officer of the Court.

XXIX.—SALES.

374. Where a sale is to take place under an order of the Court, no copy of the order, or any part thereof, is to be brought into Chambers, or the Master's office, but the original order is to be used, unless the Judge or Master requires a copy. (3rd June, 1853; Ord. 36, s. 1.)

375. An appointment or warrant in respect of the sale is to be obtained from the Judge or Master, and served upon all necessary parties. (3rd June, 1853; Ord. 36, s. 2.)

376. At the time appointed thereby, the party having the conduct of the sale, is to bring into Chambers, or the

Master's office, a draft advertisement, but no particulars or conditions of the sale, or any draft or copy thereof. (3rd June, 1853; Ord. 36, s. 3.)

Usually the plaintiff has the conduct of the sale, *Dale v. Hamilton*, 10 Hare, App. 7; though the Court may give it to another, in a proper case, as where plaintiff had liberty to bid, *Dixon v. Pyner*, 14 Jur. 218; see *Knott v. Cottey*, 27 Beav. 33.

When a sale is asked by a defendant in a foreclosure suit, the Court may require the party asking it to conduct the sale at his own expense, Ord. 430; but see *Taylor v. Walker*, 8 Grant. 508.

Where property has been put up for sale under an order of the Court, but the sale has proved abortive for want of bidders, the property may be advertised, and put up for sale again without further order, *Sherwood v. Campbell*, 1 Cham. R. 299.

377. The advertisement is to contain the following particulars:—

1. The short style of cause;
2. That the sale is in pursuance of an order of the Court;
3. The time and place of sale;
4. A short and true description of the property to be sold;
5. The manner in which the property is to be sold, whether in one lot or several, and if in several, in how many, and what lots;
6. What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether the residue of such purchase money is to be paid with or without interest;
7. Any particulars in which the proposed conditions

of sale differ from the standing conditions. (3rd June, 1853; Ord. 36, s. 4.)

Advertisements for sales under the direction of the Court should be as short as possible; the short style of the cause and a short description of the property and improvements is sufficient, and no merely formal parts, such as convey no information to intending purchasers, should be inserted, *Baxter v. Finlay*, 1 Cham. 230; *Buchan v. Wilks*, *Ibid*, 231, N. An advertisement for the sale of property under a decree, should set out all the improvements on the property, otherwise it will be referred back to the Master to re-settle the advertisement, and appoint a new day for the sale, *Heward v. Ridout*, 1 Cham. R. 244.

378. At the time named in the appointment or warrant, the Judge or Master is, to settle the advertisement; to fix the time and place of sale; to name an auctioneer, where one is to be employed; and to make every other necessary arrangement preparatory to the sale, so that nothing may remain to be done but to insert the advertisement; and all the before-mentioned matters must be done at one meeting, namely, upon the return of the appointment or warrant, where it is practicable; and no adjournment of such meeting is to take place, and no new meeting is to be appointed for the aforesaid purposes, unless it is unavoidable. (3rd June, 1853; Ord. 36, s. 5.)

379. The standing conditions of sale are to be those set forth in schedule P. (3rd June, 1853; Ord. 36, s. 13.)

380. The Judge or Master may, without further order, fix an upset price or reserved bidding, where it is thought expedient; but this must be done at the meeting before mentioned, and it must be notified in the conditions of sale. (3rd June, 1853; Ord. 36, s. 7.)

Where the plaintiff on the settlement of the advertisement neglected to ask for a reserved bidding, and the advertisement was issued, liberty to have a reserved bid was given in Chambers, and the advertisement altered accordingly, *Fraser v. Bens*, 1 Cham. R. 71.

381. All parties may bid, without taking out an order for the purpose, except the party having the conduct of the sale, and except any trustees, agents, and other persons in a fiduciary situation; and where any parties are to be at liberty to bid, it must be notified in the conditions of sale. (3rd June, 1853; Ord. 36, s. 7.)

382. The advertisement is to be inserted by the party conducting the sale, at such times and in such manner as the Judge or Master appointed at the meeting before mentioned. (3rd June, 1853; Ord. 36, s. 6.)

383. The Master or his Clerk is to conduct the sale where no auctioneer is employed. (3rd June, 1853; Ord. 36, s. 7.)

384. Biddings need not be in writing, but a written agreement is to be signed by the purchaser at the time of sale. (3rd June, 1853; Ord. 36, s. 7.)

A solicitor having the conduct of a sale, cannot withdraw the property offered after a bid has been made, *McAlpine v. Young*, 2 Cham. R. 85.

385. The deposit is to be paid to the vendor, if present, or if not, to his solicitor, at the time of sale, and is to be forthwith paid by him into Court. (3rd June, 1853; Ord. 36, s. 7.)

Where the party having the conduct of the sale, neglects to pay into Court the deposit paid to him by the purchaser at the time of sale, the Court will, on the application of the purchaser, order him to do so, *Crooke v. Glenn*, 1 Cham. R. 354.

386. After the sale is concluded, the auctioneer, where one is employed, is to make the usual affidavit according to the present practice; and where no auctioneer is employed, the Master or his Clerk is to certify to the same effect. (3rd June, 1853; Ord. 36, s. 7.)

387. The report on sale is to be in the form set forth in schedule Q, or as near thereto as circumstances permit.

388. A sale must be objected to by motion to the Court to set aside the same; and notice of the motion must be served upon the purchaser, and on the other parties to the cause; but the biddings are only to be opened on special grounds, whether the application is made before or after the report stands confirmed. (3rd June, 1853; Ord. 36, s. 10; 20th Dec. 1865; Ord. 21.)

Where one of the testator's sons bid at a Chancery sale of his father's property, such bidding being by those present supposed to be for himself, but being in reality for another person, who had secretly employed the son to bid under the expectation that there would be less competition against the son than against a stranger, and the property was knocked down to the son, but the contract was signed by the principal, and it appeared that the effect of the son's bidding, had been to deter others from bidding, the Court holding this to be a surprise on the other bidders and an unjust advantage to the purchaser, refused to enforce the purchase, and directed a re-sale at the risk and cost of the purchaser. *Rodgers v. Rodgers*, 13 Grant, 143.

Biddings will not be opened and the sale set aside on the ground that a party (the defendant) was prevented from bidding by promises made to him by the purchaser, such fact, if established, would constitute the purchaser a trustee for him, and would be subject for a suit, *Brock v. Saul*, 2 Cham. R. 145.

A purchaser at a sale under a decree is not bound by any irregularity in the proceedings so as to cause him to lose the benefit of his purchase, *Dickey v. Heron*, 1 Cham. R. 149.

Mitchell v. Mitchell 4 B. & C. 211.

389. At any time after the confirmation of the sale the purchaser may pay his purchase money and interest, if any, or the balance thereof, into Court without further order, upon notice to the party having the conduct of the sale; and when he is entitled to be let into possession of the estate, he may, if possession is wrongfully withheld from him, proceed at his own expense to obtain an order against the party in possession for the delivery thereof to him, or may call upon the vendor to cause

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possession to be delivered to him. (3rd June, 1853; Ord. 36, s. 11.)

Where money is ordered to be paid into Court, a payment to the solicitor of the party entitled to it is not a good one, and therefore is no ground for dispensing with payment into Court, *Blackburn v. Sheriff*, 1 Cham. R. 208.

A purchaser of real estate, at a sale under a decree, will not be ordered to pay the amount of his purchase money into Court until the title has been accepted or approved of, *Crooks v. Street*, 1 Cham. R. 95; but see *Stewart v. Stewart*, 1 Cham. 243.

If the purchaser neglect to pay in his purchase money, and no objection is made to the title, the Court will order him within a limited time to pay in the amount with interest, and in default direct a re-sale of the property, and that the purchaser pay costs of the motion and deficiency, if any, on re-sale, *Crooks v. Crooks*, 4 Grant, 376; but if the purchaser become insolvent, and unable to complete the contract he will be discharged from it, *Re Heely*, 1 Cham. R. 54; and see *Re Yaggie*, *Ibid*, 52.

390. After a sale under an order is confirmed, the vendor is, forthwith upon demand, to deliver an abstract of title to the purchaser; and if the purchaser does not serve objections within seven days, he is to be deemed to have accepted the abstract as sufficient. If objections are served, the vendor is to answer them within fourteen days; and if the purchaser is still dissatisfied, and if the parties cannot otherwise agree, either party may obtain from the Master a warrant to consider the abstract.

On moving to make an order *nisi* for not delivering an abstract of title absolute, it is necessary to shew that it has not been delivered to either party named in the order, *Dick v. McNab*, 1 Cham. R. 31.

391. The Master is to determine all questions upon the abstract and the sufficiency thereof; and, if desired by the purchaser, may require the vendor to make the same as perfect as he can; and if the vendor neglects or refuses to do so, he may permit the purchaser to supply defects therein, at the vendor's expense.

392. The Master is not to make a report on the abstract,

but is to mark the objections as allowed or disallowed, as the case may be ; and when he finds the abstract perfect, or as perfect as the vendor can make it, he is to certify to that effect at the foot or on the back ; and such finding is to be final unless appealed from within fourteen days thereafter.

393. After an abstract is confirmed, or is accepted by the purchaser as sufficient, no objection to the abstract is to be allowed.

394. After acceptance or confirmation of the abstract, the verification is to be proceeded with, and the vendor is with all diligence to afford the purchaser all the means of verification in his power, in the manner, and according to the practice usual with conveyancers ; and after having done so, he may serve a notice on the purchaser to make his objections or requisitions, if any, within seven days, or that otherwise he will be deemed to have accepted the title.

395. Upon being served with such notice, the purchaser if dissatisfied, is to serve his objections, or requisitions within the time thereby limited ; and the like course is to be followed upon such objections or requisitions as is prescribed by Orders 390, 391, and 392, in relation to the abstract.

396. In case of the refusal or neglect of the vendor to verify any portion of the abstract to the best of his ability, or to furnish any necessary proof or documents in his power, the Master may authorize the purchaser to do so at the vendor's expense.

397. The foregoing Orders, 390, 391, 392, 393, 394, 395, and 396, are to apply to all cases of reference to the Master as to title, as well as to sales by the Court.

XXX.—EXAMINATION *PRO INTERESSE SUO*.

398. Any party who might under the former practice, have moved to be examined *pro interesse suo* may apply to the Court, upon motion, for such relief as he may think himself entitled to. (3rd June, 1853 ; Ord. 41, s. 2.)

Under the former practice the proper course for any person who claimed title to any property sequestered, was to apply to the Court by motion or petition, to direct the plaintiff to exhibit interrogatories, in order that the party applying might be examined as to his title to the property ; and this mode of proceeding was followed where the property was in the possession of a receiver, *Brooks v. Greathead*, 1 J. & W. 176 ; *Angel v. Smith*, 9 Ves. 336.

An order for the examination of a party *pro interesse suo* could not be granted until after the sequestrators had made a return, because, it could not till then appear to the Court what had been sequestered, *Lord Pelham v. Duchess of Newcastle*, 3 Swanst. 290.

399. Notice of the motion is to be served upon the defendant or defendants at least three weeks before the day fixed for the application.

400. Within ten days from the service of the notice the affidavits in answer must be filed. Within six days after the expiration of such ten days, the affidavits in reply are to be filed, and except so far as these affidavits are in reply, they are not to be regarded by the Court, unless upon the hearing of the motion the Court gives leave to answer them ; and in that case the costs of such affidavits, and of the further affidavits consequent upon them, are to be paid by the party moving, unless the Court orders otherwise. No further evidence, on either side, is to be used upon the hearing of the motion, without the leave of the Court.

401. On hearing the motion, the Court may, instead of either granting or refusing the motion, give such directions for the examination of parties or witnesses, or for the making of further inquiries, or for the institu-

tion of any suit or action, as the circumstances of the case may require. (3rd June, 1853; Ord. 41, s. 4.)

XXXI.—COPIES.

402. Office-copies of answers, affidavits, and other proceedings are dispensed with; and where service is required, true copies, instead of office-copies, are to be served; but this order is not to apply to bills, decrees, or orders, of which office-copies are by the practice of the Court required to be served. (6th Feb. 1865; Ord. 12.)

A party requiring a copy of any pleading or affidavit, is to make a written application for the same to the solicitor of the party by whom it has been filed, or on whose behalf it is to be used; and where the party has no solicitor, then to the party himself, *Ord. 548*. Where an application is made for a copy of any pleading or affidavit, it is to be delivered within forty-eight hours from the time of the demand; and any further time which may elapse before the delivery is not to be computed against the party demanding the same, *Ord. 549*.

This Order, to furnish a copy of a pleading when demanded is imperative, and the Court will enforce compliance with it, *Totten v. Macintyre*, 2 Cham. R. 80.

If office-copy of affidavits are demanded, it is imperative on the party filing the affidavits, to furnish them, and the costs of any delay occasioned by his not doing so, falls on the party making default, *Burrows v. Hainey*, 2 Cham. R. 186.

An irregularity in the endorsement on a pleading, of the name and place of business of the solicitor filing it, is waived by demanding and receiving a copy of such pleading, *Bennett v. O'Meara*, 2 Cham. R. 167.

403. No more than four copies of any pleading or other proceeding are to be allowed to any party, in a cause or matter, exclusive of the draft, but inclusive of copies to file, copies to serve, briefs, and any other copies that may be required or made in the progress of the cause. (6th Feb. 1865; Ord. 13.)

404. If more than three copies, exclusive of the draft, are required of any pleading or other proceeding, and the party chooses to have the pleading or proceeding

printed for the purposes of the suit or matter, he is, in lieu of all charges for copies, to be allowed thirty cents per folio of the pleading or proceeding, and his reasonable disbursements of procuring the same to be printed. (6th Feb. 1865; Ord. 14.)

405. Every defendant, appearing by a different solicitor, is entitled to demand from the plaintiff two copies of any printed bill, paying for each copy two cents per folio. (6th Feb. 1865; Ord. 15.)

XXXII.—TIME.

406. Where any time limited from or after any date or event is appointed or allowed for doing an act, or taking a proceeding, the computation of such time is not to include the day of such date, or of the happening of such event, but is to commence at the beginning of the next following day; and the act or proceeding is to be done or taken at the latest on the last day of such limited time, according to such computation. (3rd June, 1853; Ord. 5, s. 1.) (*Eng. Con. Ord. 37, r. 9.*)

If the time limited were a fortnight, commencing on a Monday, it would include the second Monday following, *Angell v. Wescombe*, 1 M. & C. 48.

407. Where the time for doing an act, or taking a proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding is, so far as regards the time of doing or taking the same, to be held to be duly done or taken, if done or taken on the day on which the offices shall next open. (3rd June, 1853; Ord. 5, s. 3.)

Where the day appointed by the master's report for the payment of money fell upon a Sunday, the court refused the final order for foreclosure,

though the plaintiff attended at the same place, and between the same hours on the Saturday and Monday, *Holcomb v. Leach*, 3 Grant, 449.

408. The time of vacation is not to be reckoned in the computation of the times appointed or allowed for the following purposes :

1. Answering either an original or amended bill ;
2. Amending or obtaining orders for leave to amend bills ;
3. Setting down demurrers ;
4. Filing replications, or setting down causes under the directions of Order 152, Order 153, Order 154, or Order 155 ;
5. Master's reports becoming absolute ;
6. Moving to discharge an order of revivor ;
7. Moving to add to, vary, or set aside a decree, by any party served therewith. (3rd June, 1853 ; Ord. 5, s. 4 ; 30th June, 1858.)

409. The day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until and including the day on which such security is given, is not to be reckoned in the computation of time allowed a defendant to answer or demur. (3rd June, 1853 ; Ord. 5, s. 5.)

410. Service upon solicitors, of pleadings, notices, orders, and other proceedings, is to be made between the hours of ten o'clock in the forenoon, and four o'clock in the afternoon, except on Saturdays, when it shall be made between the hours of ten o'clock in the forenoon, and two o'clock in the afternoon. (6th February, 1865 ; Ord. 48.)

411. If service is made after four o'clock in the afternoon on any day except Saturday, the service is to be deemed as made on the following day, and if made after two o'clock on Saturday, the service is to be deemed as made on the following Monday. (6th February, 1865 ; Ord. 48.)

412. The power of the Court, and of a Judge in Chambers, to enlarge or abridge the time for doing an act, or taking a proceeding in any cause or matter, upon such (if any) terms as the facts of the case may require, or to give any special directions as to the course of proceeding in any cause or matter, is unaffected by these orders. (3rd June, 1853 ; Ord. 47.)

XXXIII.—SITTINGS OF THE COURT.

413. There are to be three re-hearing terms in each year, commencing respectively as follows :

1. The third Thursday in February ;
2. The last Thursday in August ;
3. The first Thursday in December.

414. Terms for the hearing of causes (including examination of witnesses) are to be held twice a year, at Toronto, and at such other places as the Court from time to time appoints.

415. A Judge will sit daily in each week for the despatch of all business other than re-hearings and Chamber business.

416. The business before the Judge will be taken as follows :

Monday.—Causes and demurrers.

Tuesday.—Motions.

Wednesday,	} —Hearings <i>pro confesso</i> ; motions for, decree; further directions; appeals from Master's reports; <u>petitions</u> .
Thursday,	
Friday,	
Saturday.	

417. A cause may be set down to be heard *pro confesso*, at any time after the expiration of fourteen days from the date of the order, or note *pro confesso*. (3rd June, 1853; Ord. 14, s. 1.)

418. Causes set down by way of motion for decree, or on bill and answer, or for hearing *pro confesso*, or for argument of demurrer, or upon further directions, or on appeal from Master's report, or for re-hearing, or upon petition under Order 330, or upon motion or petition to discharge an order of revivor, or to add to, vary, or set aside a decree, are to be entered with the Clerk of Records and Writs at least seven days before the day for which they are set down; and seven days' notice of the hearing or motion is to be served upon all parties entitled to notice thereof.

419. Where further directions have been reserved, if the party having the conduct of the cause does not set the same down for hearing on further directions, and serve notice thereof within fourteen days after the confirmation of the report, any other party affected by the report may set the same down, and serve notice of the hearing.

420. No cause set down for argument of demurrer, or by way of motion for decree, or on bill and answer, or on appeal from a Master's report, or on further directions, or on any petition mentioned in Order 418, adjourned over from the day for which such cause was originally set

down, is to be brought on for argument during the month of June ; and, except on circuit, no cause is to be heard during the month of June unless counsel certify that no point is involved in it on which it may be necessary for the Court to reserve judgment.

XXXIV.—VACATIONS.

421. The long vacation is to commence on the 1st day of July, and to terminate on the 21st day of August in every year. (3rd June, 1853 ; Ord. 4.)

422. The Christmas vacation is to commence on the 24th day of December in every year, and terminate on the 6th day of the following month of January. (*Eng. Con. Ord. 5, r. 4.*)

423. The days of the commencement and termination of each vacation, shall be included in and reckoned part of the vacation. (*Eng. Con. Ord. 5, r. 4.*)

424. The offices of the Court shall be open on every day in the year, except during vacation, and on Sundays, New Year's Day, Good Friday, Easter Monday, Christmas Day, the days appointed for the celebration of the birthday of Her Majesty, and Her Royal Successors, and any day appointed by Proclamation for a General Fast or Thanksgiving. (Ontario Stat. 31 Vic., ch. 1, s. 6, sub-sec. 13.)

425. During vacation, the Court will not sit, and the offices thereof are respectively to be closed ; but the offices of the Registrar, and Clerk of Records and Writs, are to be open for all purposes of making applications for injunctions ; and from ten o'clock in the forenoon till twelve o'clock noon, each day, for such proceedings as do not require the attendance of the opposite party.

As to the effect of the offices being closed on pending applications, see *Flower v. Bright*, 2 J. & H. 590.

XXXV.—MORTGAGE SUITS.

426. Instead of foreclosure, the bill in any mortgage suit, may pray a sale of the mortgaged premises, and that any balance of the mortgage debt remaining due after such sale may be paid by the mortgagor, and the same may be decreed accordingly. (3rd June, 1853; Ord. 32, s. 3.)

The Court will not make a personal order against the mortgagor under this section, unless asked by the prayer of the bill.

Where in a bill praying foreclosure only, a decree for sale was drawn up with a direction that the mortgagor should pay any deficiency, the Court, at the instance of the mortgagor, four years afterwards, amended the decree by striking out this direction, but ordered the mortgagor to pay the costs of the proceedings which had been taken under the decree, *Cochenour v. Bullock*, 12 Grant, 138.

The owner of land, after creating a mortgage thereon, assigned his equity of redemption to a third party, who covenanted to pay off the mortgage debt, and afterwards became the purchaser of the mortgaged premises, under a decree at the suit of the mortgagee; the amount realized at the sale not being sufficient to cover the amount due on the mortgage, the mortgagee was held not entitled to any lien on the premises for the deficiency, *Forbes v. Adamson*, 1 Cham. R. 117.

Where the decree directs foreclosure, the Court may, on default in payment, grant an order for sale without re-hearing the cause, *Jaslett v. Cliffe*, 2 Sm. & G. 278; overruling, *Girdlestone v. Lavender*, 9 Hare, App. 53; see also, *Wayn v. Lewis*, 22 L. J. Ch. 1051. But the Court will not after a decree for sale, order a foreclosure without re-hearing the cause, and notice of the re-hearing must be served on the defendant, even although the bill has been taken *pro confesso*, *McLellan v. Jacobs*, 9 Grant, 50.

427. Where any person is surety for the payment of a mortgage debt, such person may be made a party to a suit for the sale of the mortgaged property, and the relief specified in the last Order may be prayed against both the mortgagor and his surety, and the same may be decreed accordingly. (3rd June, 1853; Ord. 32, s. 4.)

428. The Court may direct a sale of the property, instead of a foreclosure of the equity of redemption, on such terms as the Court thinks fit; and, if the Court thinks fit, without previously determining the priorities of incumbrancers, or giving the usual or any time to redeem. (3rd June, 1853; Ord. 32, s. 2.)

Some special ground must be shewn to induce the Court to depart from the ordinary rule of allowing six months for redemption, *Rigney v. Fuller*, 4 Grant, 198.

429. If the request for a sale is made by a subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the party making the request is to deposit in Court a reasonable sum of money, to be fixed by the Court, for the purpose of securing the performance of such terms as the Court thinks fit to impose. (3rd June, 1853; Ord. 32, s. 2.)

430. If before, or upon the deposit to obtain a sale being made, the plaintiff prefers that the sale be conducted by the defendant desiring the sale, he may so elect; and he is thereupon to notify the defendant of such election. The notice may be to the effect set forth in schedule R.

The defendant is not entitled to insist upon a sale instead of a foreclosure against the consent of the mortgagee, without paying in the usual deposit, upon his undertaking the conduct of the sale, *Taylor v. Walker*, 8 Grant, 508.

431. Upon the plaintiff's filing with the Registrar a note of such election, and proof of service of such notice, the defendant making the deposit is to be entitled to a return thereof. (20th Dec. 1865; Ord. 10.)

432. Where the cause is heard upon an order to take the bill *pro confesso*, in a suit for foreclosure or sale, and no reference as to incumbrances is required, the plaintiff is to produce at the hearing:

1. The mortgage deed, and the assignments thereof, if any ;
2. An affidavit which is to state the amount advanced upon the security ; the amount paid, whether by receipt of rent or otherwise ; and the amount remaining due for principal and interest, distinguishing how much for principal and how much for interest. The affidavit is to state whether the mortgaged premises, or any part of them, have been in the occupation of the mortgagee, or of any one under whom he claims ; and, when there has been any such occupation, the affidavit is to state its nature, the time it continued, and the fair rentable value of the property. (3rd June, 1853 ; Ord. 32, s. 7.)

433. Upon production of such proofs and documents, the Court may at once determine the amount due, and appoint the time and place for the payment of the mortgage money, by the decree, without a reference to the Master, or any further enquiry. (3rd June, 1853 ; Ord. 32, s. 7.)

434. In an ordinary suit of foreclosure or sale against an infant heir or devisee of the mortgagor, or of the assignee of the mortgagor, where no defence is set up in the infant's answer, the cause is not to be set down to be heard in Court by way of motion for a decree ; but after the infant's answer is filed, or after the time for filing the same has expired, the plaintiff is to file affidavits of the due execution of the mortgage, and of such other facts and circumstances as entitle him to a decree, and is to apply for the decree in Chambers, upon notice to the infant's solicitor. (1st April, 1867 ; Ord. 2.)

In decrees of foreclosure against infant defendants, a day to shew cause after attaining twenty-one, must be reserved to the defendants, *Mair v.*

Kerr, 2 Grant, 223; and the final order of foreclosure must also reserve a day to shew cause.

But where a decree for foreclosure is made against the ancestor of the infants, it is not necessary where the suit is revived against the infants, to insert in the final order a day for the infants to shew cause, *Sutherland v. Dickson*, 2 Cham. R. 25.

Infants made parties by revivor, cannot set up a defence which their ancestor had not set up, unless he had been prevented by fraud or mistake from pleading it, *Burke v. Pyne*, 2 Cham. R. 193.

Where the heirs of the mortgagor are infants, and a bill is filed against them for foreclosure, the rule of the Court is to grant a reference as of course, to enquire whether a sale or foreclosure is more for the benefit of the infants, but if affidavits are filed to satisfy the Court as to the proper decree, or if the guardian consents, the reference may be dispensed with, *Dudley v. Berezy*, 13 Grant, 141; but see *Graham v. Davis*, 2 Cham. R. 24.

Where the decree directed an enquiry whether a sale or foreclosure would be more beneficial for the infants, and the report made under the decree did not find in favor of either sale or foreclosure, but was silent on the subject, a final order for sale was refused, *Edwards v. Burling*, 2 Cham. R. 48.

435. Where the defendant answers the bill, admitting the execution of the mortgage and other facts, if any, entitling the plaintiff to a decree, or where the defendant disclaims any interest in the mortgaged premises, or where no answer is put in to the bill, the plaintiff is, on precept to the Registrar, to be entitled to such a decree as would under the practice of the Court have been made upon the hearing of the cause *pro confesso*. (20th Dec. 1865; Ord. 11.

Where in a foreclosure suit, an injunction has been granted, the Registrar cannot issue a decree on precept continuing the injunction, but the cause must be brought on for hearing, *King v. Freeman*, 1 Cham. R. 350.

Where proceedings are taken against an absent defendant by advertisement, a decree cannot be granted upon precept, *McMichael v. Thomas*, 14 Grant, 249.

436. Where no answer is filed, the decree is to be drawn up upon production of an office-copy of the bill and an affidavit of the service thereof, shewing the same to

have been endorsed with the notice set forth in schedule S hereunder written.

On taking the account in a foreclosure suit no more can be found due than the amount claimed by the endorsement on the bill, *Boyd v. Wilson*, 1 Cham. R. 258.

437. The notice under Order 436, is to specify whether the plaintiff desires a foreclosure of the equity of redemption, or a sale of the mortgaged premises. (20th Dec., 1865; Ord. 9.)

Where the endorsement did not specify whether sale or foreclosure of the mortgaged premises was sought, the service of the bill was set aside, *Drewry v. O'Neil*, 2 Cham. R. 204.

438. Where it appears conducive to the ends of justice that parties interested in the equity of redemption should be allowed to be made parties in the Master's office, by reason of the parties so interested being numerous or otherwise, the Court may direct that parties so interested be made parties in the Master's office, upon such terms as to the Court seems fit; such order to be made only where one or more parties interested in the equity of redemption are already before the Court. (29th June, 1861.)

An order to make persons interested in the equity of redemption, parties in the Master's office, will not be granted *ex parte*; notice should be served on the owners of the equity of redemption already before the Court, but not on those proposed to be added, *Penner v. Caniff*, 1 Cham. R. 351; but see, *Cummins v. Harrison*, 1 Cham. R. 369.

Where after a final order of foreclosure had been obtained, it was sought to add, as a party, a person who had purchased part of the mortgaged property, but who had not been made a party to the suit, either by bill or in the Master's office, Vankoughnet C., though granting a fiat on the petition, expressed a strong opinion that no order could be made thereon, *Orford v. Bailey*, 1 Cham. R. 272.

See also, *Portman v. Paul*, 10 Grant, 458.

Where under an order in Chambers after decree, parties are added as being interested in the equity of redemption, an application to set aside

the order must be made to the Court and not in Chambers, *Tyce v. Meyers*, 3 U. C. L. J. N. S. 102.

439. Where the bill is filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause.

440. Where the plaintiff prays a sale or foreclosure, subject to a prior mortgage, the prior mortgagee is not to be made a party either originally or in the Master's office, except under special circumstances to be alleged in the bill. (6th Feb. 1858.)

441. Decrees for foreclosure or sale, where a reference is required, are, after the proper recitals hitherto in use, to direct, in general terms, that all necessary enquiries be made, accounts taken, costs taxed, and proceedings had for redemption or foreclosure, (or for redemption or sale *as the case may be*) and that for these purposes the cause is referred to (*naming the Master*;) and a decree so expressed is to be read and construed as if the same set forth the particulars contained in the next thirteen Orders.

Where a plaintiff in a suit for foreclosure or sale asks a reference to the Master to enquire as to encumbrancers, he takes such a reference at the peril of costs, if there are in reality no incumbrancers, *Hamilton v. Howard*, 4 Grant, 581.

442. Upon such reference the Master is to inquire and state, whether any person or persons, and who other than the plaintiff, has or have any lien, charge or incumbrance upon the lands and premises embraced in the mortgage security of the plaintiff, in the bill mentioned subsequent thereto. ✓

443. The plaintiff is to bring into the Master's office certificates from the Registrar and Sheriff of the County wherein the lands lie, setting forth all the incumbrances

which affect the property in the pleadings mentioned, and such other evidence as he may be advised.

444. The Master is to direct all such persons as appear to him to have any lien, charge, or incumbrance upon the estate in question, to be made parties to the cause, and to be served with a notice in the form set forth in schedule T hereunder written. (6th Feb. 1858.)

Persons so added are parties from the date of the Master's order, making them so, *Sterling v. Campbell*, 1 Cham. R. 147.

When a mortgagee takes proceedings to foreclose against the mortgagor and the estate of a deceased mesne incumbrancer, the real representatives of such deceased incumbrancer are not necessary parties, *Taylor v. Stead*, 1 Cham. R. 74; *Grimshaw v. Parks*, 6 U. C. L. J. 142.

445. Any party served with a notice under Order 444 may apply to the Court at any time within fourteen days from the date of the service, to discharge the order making him a party, or to add to, vary, or set aside the decree.

The time of vacation is not to be reckoned in the computation of the fourteen days, *Ord.* 408.

446. The Master, before he proceeds to hear and determine, is to require an appointment to the effect set forth in schedule T to be served upon the incumbrancers made parties before the hearing, whether the bill has been taken *pro confesso* against such persons or not. (6th Feb. 1858.)

447. When any person who has been duly served with a notice under Order 444, or with an appointment under Order 446, neglects to attend at the time appointed, the Master is to treat such non-attendance as a disclaimer by the party so making default; and the claim of such party is to be thereby foreclosed, unless the Court order otherwise, upon application duly made for that purpose. (6th Feb. 1858.)

When a person made a party in the Master's office appears and disclaims, he is not entitled to any costs, as by remaining inactive the same end will be attained as by disclaiming, *Halt v. Park*, 6 Grant, 533

448. When all parties have been duly served, the Master is to take an account of what is due to the plaintiff, and to such other incumbrancer or incumbrancers, (if any), for principal money and interest; and to tax to them their costs and settle their priorities; and also to appoint a time and place, or times and places, for payment according to the practice of the Court.

Where the Master's report, directing the payment of mortgage money on a day being six months from the date thereof, was not dated, and the decree gave six calendar months, a new day for payment had to be taken, *Scott v. McKeown*, 1 Cham. R. 186.

A final order cannot be granted where the Master's report is not confirmed before the day appointed for payment, *Mountain v. Porter*, 1 Cham. R. 207; *Mills v. Dickson*, 2 Cham. R. 53.

Where before the day for payment arrives, the agency of the Bank at which the money is payable is closed, a new day for payment must be appointed, and the order served, *King v. Conner* 1 Cham. R. 274.

Where the plaintiff desires to dispense with service of an order appointing a new day, on the ground of the defendant being out of the jurisdiction, the plaintiff's affidavit is not sufficient evidence to justify dispensing with service, *Adams v. Eamer*, 1 Cham. R. 260.

Where there are several incumbrancers and one day is given to them to redeem, or in default foreclosure, and the incumbrancer first in priority redeems, a new account must be taken and a new day for payment appointed, giving the others an opportunity to redeem, *Ardagh v. Wilson*, 1 Cham. R. 389.

Even after the final order of foreclosure has been obtained the defendant may apply for an extension of the time for the payment of the mortgage money.

The order is not obtained as of course, and the application will be refused when the excuse for default is not satisfactory and the security is not ample, *Eyre v. Hanson*, 2 Beav. 478; *Nanny v. Edwards*, 4 Russ. 124; and the Court will not interfere to open foreclosure in aid of a defendant who has been guilty of laches and shewn no effort to save his estate, *Brothers v. Lloyd*, 2 Cham. R. 119; an affidavit by the solicitor that the defendant was exerting himself to raise the money was held insufficient, *Anon*, 4 Grant, 61.

The enrolment of the final order is no objection to the application if made promptly, and the Court has the means of giving the mortgagee immediate payment, *Thornhill v. Manning*, 1 Sim. N. S. 451. An enlargement of the time may be given oftener than once.

On applying, the defendant should shew a reasonable excuse for non-payment on the day appointed, a probability of redeeming at the expiry of the extended time, and that the property is ample security, *Johnson v. Ashbridge*, 2 Cham. R. 251; and when the plaintiff can be placed in the same position he occupied before the default, and recompensed for any damage he may have suffered, and when there appears a prospect of the amount of the mortgage money being paid within the period asked for, the Court will not refuse to open the foreclosure, *Waddell v. McColl*, 2 Cham. R. 62; and see *G. v. V.* 2 Cham. R. 33.

Where it was shewn that the defendant was hindered in selling or raising money on the lands in consequence of an advertisement signed and circulated by the plaintiff's solicitor, the time for payment was extended without costs, *Gilmour v. Meyers*, 2 Cham. R. 179.

At one period the terms on which an application was granted, appear to have been to require payment of the interest and costs by an early day, and to extend for six months the period for payment of the principal money, *Whatton v. Craddock*, 1 Keen, 269; *Brewen v. Austin*, 2 Keen, 211; *Geldard v. Hornby*, 1 Hare, 251; and this rule seems still followed where the security is not ample, *Fisher on Mortgages*, 994.

The course more generally followed now is to extend the time upon payment of the costs of the application, charging defendant with interest on the gross amount reported due, *Holford v. Yate*, 1 K. & J. 677; *Whitfield v. Roberts*, 7 Jur. N. S. 1268; and see *Howard v. Macara*, 1 Cham. R. 27.

449. The Master's report must state the names of all persons who have been made parties in his office, and who have been served with the notice or appointment hereinbefore provided, the names of such as have made default, and must settle the priorities, &c., of such as have attended, and these latter are to be certified as the only incumbrancers upon the estate. (6th Feb. 1858; Ord. 6.)

450. In case of payment by any party according to the report, the party to whom payment is made, is to convey the premises, free and clear of all incumbrances, done by him, and deliver up all deeds and writings in his custody

or power, relating thereto, upon oath, to the party making the payment, or to whom he may appoint.

451. In default of payment being made according to the report, the plaintiff is to be entitled, on an *ex parte* application, to a final order of foreclosure against the party making default.

Where co-mortgagees are made co-plaintiffs in a foreclosure suit, the affidavit as to non-payment, on which to obtain the final order of foreclosure, should be made by all of them, *Annis v. Wilson*, 1 Cham. R. 217; and the affidavit by the plaintiff should shew that he has not been in possession of the mortgaged property, nor in the receipts of the rents and profits, *Scott v. McDonnell*, 1 Cham. R. 193.

Where the mortgagee is in occupation of the mortgaged premises, the Master should charge him with occupation rent up to the day appointed for payment, and where it appeared that a mortgagee had been charged with occupation rent to the date of the Master's report only, a final order was refused, *Pipe v. Shafer*, 1 Cham. R. 251; and where the plaintiff's affidavit shewed that he had been in occupation of the property, it was referred back to the Master to take a new account, set an occupation rent and appoint a new day for payment, although the plaintiff swore that he was in occupation merely as caretaker, and had not received any rents or profits, *Cummer v. Tomlinson*, 1 Cham. R. 235.

After the day appointed for the payment of the amount due in a foreclosure suit, the plaintiff having entered into possession of the mortgaged property, he was held entitled to a final order of foreclosure without a new account being taken, *Greenshield v. Blackwood*, 1 Cham. R. 60; *Constable v. Howick*, 5 Jur. N. S. 331.

On an application for a final order of foreclosure, where the affidavit of non-payment is made by the plaintiff's agent, it should state that he is authorised to receive the money, *Powers v. Merriman*, 1 Cham. R. 225; but the authority of the agent need not be produced, it is sufficient for him to swear that he is the duly authorised agent, *Radcliffe v. Duffy*, 1 Cham. R. 302; the affidavit must shew where the custody of the mortgage has been, *Rae v. Shaw*, 1 Cham. R. 209.

Where the affidavit as to non-payment is made by the plaintiff's solicitor, it must be shewn that the plaintiff has no other agent within the jurisdiction authorised to receive the money, *Taylor v. Cuthbert*, 1 Cham. R. 240.

On an application by a company for a final order, the affidavit of the officer of the company as to non-payment, should shew that he is the proper officer to receive the money, *Western Assurance Co. v. Capreol*, 1 Cham. R. 227.

The certificate under Order 257 from the Bank officer should shew that the money has not been paid before, as well as on or since the day appointed, *Farrell v. Stokes*, 1 Cham. R. 201.

Where an order for sale was taken out *ex parte* by mistake instead of an order for foreclosure, the Court on an *ex parte* application will vacate the order for sale and grant an order for foreclosure, *McGillivray v. Cameron*, 1 Cham. R. 197.

Where two years had elapsed from the day appointed for payment, an *ex parte* application for a final order of foreclosure was refused, *Kirchoffer v. Stafford*, 2 Cham. R. 52.

452. All subsequent accounts are, from time to time, to be taken, subsequent costs taxed, and necessary proceedings had, for redemption by, or foreclosure of, the other party or parties entitled to redeem the mortgaged premises, as if specific directions for all these purposes had been contained in the decree.

453. If the decree directs a sale instead of foreclosure on default in payment, then on default being made, and an order for sale obtained, the premises are to be sold, with the approbation of the Master, and he is to settle the conveyance to the purchaser in case the parties differ about the same; and the purchaser is to pay his purchase money into Court, to the credit of the cause, subject to the further order of the Court.

454. The purchase money, when so paid in, is to be applied in payment of what has been found due to the plaintiff and the other incumbrancer or incumbrancers, (if any), according to their priorities, together with subsequent interest, and subsequent costs, when computed and taxed by the Master.

455. In the event of the purchase money being insufficient to pay what has been found due to the plaintiff for principal interest and costs, subsequent interest and subsequent costs, the plaintiff is to be entitled, (where the mortgagor is a defendant and such relief is prayed by

the bill,) to an order *ex parte* for the payment of the deficiency.

As to the order for the payment of any deficiency, see *Cochenour v. Bullock*, 12 Grant, 138; *Forbes v. Adamson*, 1 Cham. R. 117.

456. An incumbrancer made a party in the Master's office, and entitled to, and desiring a sale of the mortgaged premises, is to make the necessary deposit therefor before the Master's report is settled, whereupon the Registrar is to issue an order on precipe, directing a sale of the mortgaged premises instead of a foreclosure, and thereupon the Master is to compute subsequent interest, and appoint a time and place, or times and places, for payment; and all subsequent proceedings are to be taken and had as if the decree had been in the first instance a decree for sale.

457. Where the state of the account ascertained by an order, or by the report of the Master, is changed by payment of money, by receipt of rents and profits, by occupation rent, or otherwise, before the final order for foreclosure or sale is obtained, the plaintiff, or other party to whom the mortgage money is payable, may give notice to the party by whom the same is payable, that he gives him credit for a sum certain, to be named in the notice, and that he claims that there remains due in respect of such mortgage money a sum certain, to be also named in the notice. (29th June, 1861.)

The notice of credit must be given before the day for payment arrives, *Knottinger v. Barber*, 1 Cham. R. 258.

458. Upon the final order for foreclosure or sale being applied for, if the Judge thinks the sums named in such notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the Judge directs notice to be given. (29th June, 1861.)

459. The party to whom the mortgage money is payable, may apply in Chambers for a reference to a Master, or for an appointment, to fix such sums respectively; and in the latter case either upon notice, or *ex parte*, as the Judge thinks fit; and the order to be made thereupon is to be served, or service thereof dispensed with, as the Judge directs. (29th June, 1861.)

460. The party to whom such notice is given may apply in Chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid, instead of the amounts mentioned in such notice; or for a reference to a Master for the like purpose; and in case the Judge thinks a reference to a Master proper, the same may be made *ex parte* unless the Judge otherwise directs. (29th June, 1861.)

461. Where a suit has been instituted for the foreclosure of the equity of redemption in any mortgaged property, for default in the payment of interest, or of an instalment of the principal, a defendant may move to dismiss the bill upon paying into Court the amount then due for principal, interest, and costs. (3rd June, 1853; Ord. 32, s. 5.)

Upon default in payment of any instalment of principal or interest, the mortgagee has a right to call in the whole amount secured by the mortgage, *Sparks v. Redhead*, 3 Grant, 311; *Cameron v. McRae*, *Ibid*; but a mortgagee who holds several mortgages in fee on the same land, one of which is not due, cannot file a bill to foreclose that mortgage with the others, *Thibodo v. Collar*, 1 Grant, 147.

When a defendant moves to stay proceedings under this section, the interest is to be calculated up to the last sale day, and not up to the time of making the application, *Strachan v. Murney*, 6 Grant, 378.

A mortgagee is not obliged to accept payment of the whole principal and interest on a mortgage on which only a certain amount is over due, on a bill filed for foreclosure, *Green v. Adams*, 2 Cham. R. 134.

462. Where a suit has been instituted for the purpose and under the circumstances specified in the last Order,

a defendant may move to stay the proceedings in the suit, after decree, but before sale or final foreclosure, upon paying into Court the amount then due for principal, interest, and costs. (3rd June, 1853; Ord. 32, s. 6.)

463. Where an application is made to stay the proceedings under Order 462, the decree may afterwards be enforced, by order of the Court, upon subsequent default in the payment of a further instalment of the principal, or of the interest. (3rd June, 1853; Ord. 32, s. 6.)

After payment under this section of what is due, it is irregular to take any further proceedings in the cause until another instalment falls due, *Carroll v. Hopkins*, 4 Grant, 431; as to the period up to which interest is to be computed, see note to preceding Order.

Where a stay of proceedings has been ordered and default is made in payment of another instalment of interest, an order will be granted directing payment of the whole sum secured, with liberty to the defendant to pay the sum now actually payable, and directing a stay of proceedings on such payment being made, *Strachan v. Devlin*, 1 Cham. R. 8.

464. In a suit for foreclosure or for redemption, the mortgagor or other person entitled to the equity of redemption, being in possession of the premises foreclosed, may be ordered to deliver up possession of the same upon or after final order of foreclosure, or for the dismissal of the bill, as the case may be. (29th June, 1861.)

This section refers only to mortgage cases, and does not apply where the bill in a suit for specific performance is dismissed at the hearing, *Mavety v. Montgomery*, 1 Cham. R. 21.

The Court will not make such an order against the tenants of the mortgagor or owner of the equity of redemption, although such tenancy may have begun after the mortgage was made, *Bank of Montreal v. Ketchum*, 1 Cham. R. 117; an order for delivery of possession is only made against persons not parties, when they acquired possession *pendente lite* from a party to the suit, and have no pretence of having a paramount title, though the rule may be somewhat broader in the case of receivers and sequestrators, *Bank of Upper Canada v. Wallace*, 13 Grant, 184.

An order for delivery of possession will not be granted *ex parte*, but notice of motion must be served; even though the bill has been taken *pro confesso*; *Hodkinson v. French*, 1 Cham. R. 201.

After the final order for foreclosure an order for delivery of possession will be granted, although not asked for when the final order was obtained, *Lazier v. Ranney*, 6 Grant, 323; and see *Mason v. Seney*, 2 Cham. R. 30,

On moving to commit for contempt in not obeying such an order, it must be shewn that possession was demanded, *Nevieux v. Labadie*, 1 Cham. R. 13.

Where more than three years have elapsed between the final order, and the application for delivery of possession, an affidavit is required to shew the circumstances of the possession and the final order, and that the defendant has never relinquished possession, *Irving v. Munn*, 1 Cham. R. 240.

The fact that an ejectment suit has been brought by the mortgagee, and is pending, is no bar to obtaining the usual order for possession, after final order for foreclosure, but in such a case the order will be granted only on the terms of discontinuing the action at law, and paying the costs of it, *Moffatt v. White*, 1 Cham. R. 227.

465. Where a mortgagee has proceeded at law upon his security, he shall not be entitled to his costs both at law and in equity, unless the Court sees fit to order otherwise. (6th Feb. 1858; Ord. 7.)

Where a mortgagee proceeds both at law and in equity, he cannot, in the absence of special circumstances to justify the proceedings, elect to take the Chancery costs instead of those at law, if the defendant objects thereto, *Weir v. Taylor*, 1 Cham. R. 371.

466. In a redemption suit, if the plaintiff does not redeem the defendants, or such of them as he is ordered to redeem, the bill need not be dismissed; but where there are other defendants, in lieu of the bill being dismissed the plaintiff may be declared foreclosed, and directions may be given, either by the decree or by subsequent orders, as to the relative rights and liabilities of the defendants as amongst themselves; and such proceedings are in such case to be thereupon had, and with the same effect, as in a foreclosure suit. (6th Feb. 1865; Ord. 24.)

XXXVI.—ADMINISTRATION SUITS.

467. Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin,

or one of the next of kin, or the heir, or a devisee interested under the will of a deceased person, may apply to the Court upon motion, without bill filed, or any other preliminary proceeding, for an order for the administration of the estate, real or personal, of such deceased person. (3rd June, 1853; Ord. 15, s. 1.)

The proceedings under this order are intended for simple cases only, *Acaster v. Anderson*, 19 Beav. 161; *Rump v. Greenhill*, 20 Beav. 512; and see, *Nudel v. Elliott*, 1 Cham. R. 326; and where executors are charged with misconduct, a bill must be filed, *Re Babcock*, 8 Grant, 409.

Executor is not chargeable with breach of trust in a suit by administration summons, but enquiries may be directed as to value of the property in question, *Re Delavante*, 6 Jur. N. S. 118; and an executor cannot be charged on admission of assets, *Re Wiltshire*, 8 W. R. 133.

After an order made upon summons the Court will stay an action at law against the executor, as after a decree obtained upon a bill, *Gardner v. Garrett*, 20 Beav. 469.

Administration may be ordered on summons, of effects bequeathed by a married woman under a power, *Sewell v. Ashley*, 3 D. M. & G. 933.

Executors having objected to pay into Court a sum of money, on the ground that it had been paid to their solicitor for watching and protecting the interest of the estate upon claims of creditors brought into the Master's office; held that they were entitled to do so; as it is the duty of the executors to protect and look after the interest of the estate upon these enquiries, and this they do, not strictly as accounting parties, but in virtue of their representative character, *Re Babcock*, 8 Grant, 409.

After notice of motion served for an order to administer the estate of an intestate, a commission may be obtained for the examination of witnesses, with a view of establishing the fact that the party applying for the order, is one of the next of kin of the intestate, *Farrell v. Cruikshank*, 1 Cham. R. 12.

Notice of motion for an administration order having been served on the widow of the intestate as administratrix, the application was refused, there being no evidence produced that letters of administration had been granted to her, *Fowler v. Marshall*, 1 Cham. R. 29.

A motion having been made, upon notice, for an administration order, the order not having been drawn up and no steps having been taken for four years, an application in Chambers for a direction to the Registrar to draw up the order, was refused, and new notice required to be served, *Re Forrester*, 1 Cham. R. 29.

Where several suits are instituted for administration of a testator's estate, and a question arises as to their amalgamation, and the conduct of



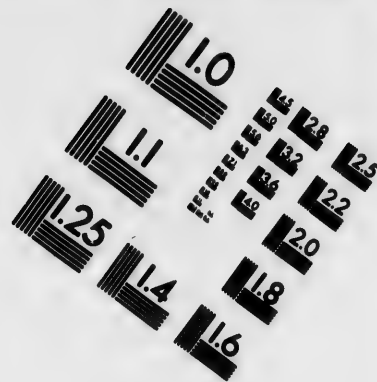
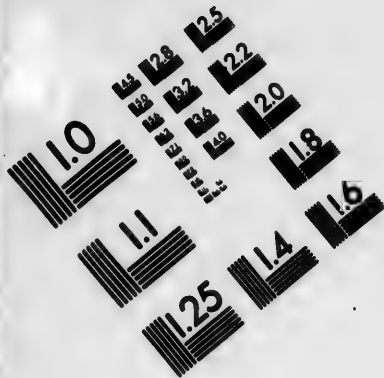
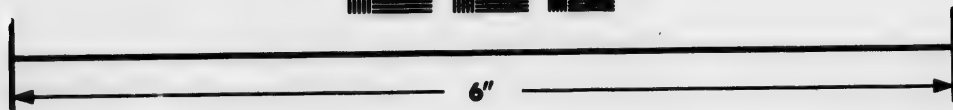
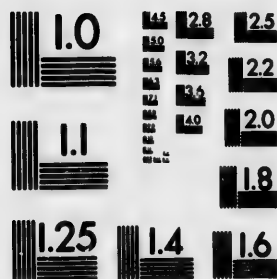


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the cause, the preference will be given to a residuary legatee, or other person who has an interest in the residue, in preference to a creditor, *Penny v. Francis*, *Woodhatch v. Francis*, 7 Jur. N. S. 248.

468. The notice of motion is to be in the form or to the effect set forth in schedule U hereunder written, and must be served upon the executor or administrator. (3rd June, 1853; Ord. 15, s. 1.)

It is no bar to the appointment of a guardian *ad litem* to an infant defendant, in an administration suit, that the application for the guardian is made before the return of the notice of motion for the administration order, *Barry v. Brazil*, 1 Cham. R. 237.

Next of kin are not necessary parties to an administration suit, but should be served with an office-copy of the decree, *English v. English*, 12 Grant, 441.

469. Upon proof by affidavit of the due service of the notice of motion, or on the appearance in person, or by his solicitor or counsel, of the executor or administrator, and upon proof by affidavit of such other matter, if any, as the Court requires, the Court may make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case require; and the order so made is to have the force and effect of a decree to the like effect made on the hearing of a cause between the same parties. (3rd June, 1853; Ord. 15, s. 1.)

Some evidence of the applicants having a right to call for administration of the estate must be furnished, *Re Clarke*, 2 Cham. R. 57.

The facts that the estate is small, that no imputation is made against the executors, and that it is unadvisable to incur legal expenses, are no answer to a motion for administration by a legatee against the executors *Re Falconer*, 1 Cham. R. 273.

Where in an administration suit the whole of the real and personal estate of the intestate was insufficient to pay the creditors, the heir at law and administratrix were allowed their costs as between solicitor and client, *Taydrew v. Howell*, *Perry v. Howell*, 7 Jur. N. S. 937; 9 W. R. 296.

A party appealing from a decree in an administration suit successfully, was allowed the costs of the appeal out of the estate, *Menzies v. Ridley*, 2 Grant, 544.

Costs ought to be given out of the estate, for those proceedings only which are commenced for the benefit of the estate, or which have in their result been of benefit, *Bartlett v. Wood*, 9 W. R. 817; see also as to costs, *Maddison v. Chapman*, 1 J. & H. 470; *Barnewell v. Iremonger*, 1 Dr. & Sm. 255; *Sullivan v. Bevan*, 20 Beav. 399; *Norris v. Bell*, 9 Grant, 23; *Millar v. McNaughten*, 11 Grant, 308; *Blain v. Terryberry*, 12 Grant, 221.

470. The Court is to give any special directions touching the carriage or execution of the order, which it deems expedient; and in case of applications for any such order by two or more persons, or classes of persons, the Court may grant the same to such one or more of the claimants as it thinks fit; and the carriage of the order may be subsequently given to any party interested, and upon such terms as the Court may direct. (3rd June, 1853; Ord. 15, s. 1.)

Although proceedings in the Master's office may, under the general order, be taken *ex parte*, against a defendant who has allowed a bill to be taken *pro confesso*, that mode of proceeding is irregular under an administration order without bill, *Re Pattison*, 12 Grant, 47.

471. An order for the administration of the estate of a deceased person may be obtained by his executor or administrator, and all the provisions of the foregoing Orders are to extend to applications by an executor or administrator. (3rd June, 1853; Ord. 15, s. 2.)

472. No accounts or inquiries in respect of the real estate are to be directed, unless notice of the application has been given to the heirs and devisees interested therein, or one or more of them. (20th Dec. 1865; Ord. 13.)

473. After inquiries directed in respect of the personal estate, the Court may, in a proper case, after notice given to those interested in the real estate, or to one or more of them, make a supplemental order in respect of the real estate, upon such terms as the Court sees fit. (20th Dec. 1865; Ord. 13.)

474. In taking an account of a deceased's personal estate under an order of reference, the Master is to enquire and state to the Court what, if any, of the deceased's personal estate is outstanding or undisposed of; and is also to compute interest on the deceased's debts from the date of the decree, and on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will. (3rd June, 1853; Ord. 42, s. 14.)

475. Every advertisement for creditors affecting the estate of a deceased person, which is issued pursuant to an order, is to direct every creditor, by a time to be thereby limited, to send to such other party as the Master directs, or to his solicitor, to be named and described in the advertisement, the name and address of such creditor, and the full particulars of his claim, and a statement of his account, and the nature of the security (if any) held by him; and such advertisement is to be in the form set out in schedule V form No. 1, with such variations as the circumstances of the case require; and at the time of directing such advertisement, a time is to be fixed for adjudicating on the claims. (20th Dec. 1865; Ord. 22.)

476. No such creditor need make an affidavit, or attend in support of his claim (except to produce his security, if any), unless he is served with a notice requiring him so to do, as hereinafter provided. (20th Dec. 1865; Ord. 23.)

477. Every such creditor is to produce before the Master, the security (if any) held by him, at such time as is specified in the advertisement for that purpose, being the time appointed for adjudicating on the claims; and every creditor, if required by notice in writing, to be given by the executor or administrator of the deceased, or by such other party as the Master directs, in the form set forth in

schedule V form No. 2, is to produce all other deeds and documents necessary to substantiate his claim before the Master, at such time as is specified in the notice. (20th Dec. 1865; Ord. 24.)

478. In case a creditor neglects or refuses to comply with the next preceding Order, he is not to be allowed any costs of proving his claim, unless the Master otherwise directs. (20th Dec. 1865; Ord. 25.)

479. The executor or administrator of the deceased, or such other party as the Master directs, is to examine the claims sent in pursuant to the advertisement, and is to ascertain, as far as he is able, to which of such claims the estate of the deceased is justly liable. (20th Dec. 1865; Ord. 26.)

480. The executor or administrator, or one of the executors or administrators, or such other party either alone or jointly with his solicitor, or other competent person, or otherwise, as the Master directs, is, at least seven clear days before the day appointed for adjudication, to file an affidavit which may be in the form No. 3, in schedule V, verifying a list of the claims, the particulars of which have been sent in pursuant to the advertisement, and stating to which of such claims, or parts thereof, respectively, the estate of the deceased is, in the opinion of the deponent, justly liable, and his belief that such claims, or parts thereof respectively, are justly due, and proper to be allowed, and the reasons for such belief. (20th Dec. 1865; Ord. 26.)

481. In case the Master thinks fit so to direct, the making of the affidavit referred to in the next preceding Order, is to be postponed till after the day appointed for adjudication, and is then to be subject to such directions as the Master may give. (20th Dec. 1865; Ord. 27.)

482. At the time appointed for adjudicating upon the claims, or at any adjournment thereof, the Master may allow any of the claims, or any part thereof respectively, without proof by the creditors, and may direct such investigation of all or any of the claims not allowed, and require such further particulars, information, or evidence relating thereto, as he thinks fit, and may, if he so thinks fit, require any creditor to attend and prove his claim, or any part thereof; and the adjudication on such claims as are not then allowed is to be adjourned to a time to be then fixed. (20th Dec. 1865; Ord. 28.)

483. Notice is to be given by the executor or administrator, or such other party as the Master directs:

1. To every creditor whose claim, or any part thereof, has been allowed without proof by the creditor, of such allowance, and such notice may be in the form No. 4 in schedule V.
2. And to every such creditor as the Master directs to attend and prove his claim, or such part thereof as is not allowed, by a time to be named in such notice, (which may be in the form No. 5 in schedule V,) not being less than seven days after such notice, and to attend at a time to be therein named, being the time to which the adjudication thereon has been adjourned; and in case any creditor does not comply with such notice, his claim, or such part thereof as aforesaid, is to be disallowed, unless the Master thinks fit to give further time. (20th Dec. 1865; Ord. 29.)

484. A creditor who has not before sent in particulars of his claim pursuant to the advertisement, may do so seven clear days previous to any day to which the adjudication is adjourned. (20th Dec. 1865; Ord. 30.)

485. After the time fixed by the advertisement, no claim is to be received (except as before provided in case of an adjournment,) unless the Master thinks fit to give special leave upon application, and then upon such terms and conditions as to costs and otherwise as the Master directs. (20th Dec. 1865; Ord. 31.)

486. Where an order is made for payment of money out of Court to creditors, the party whose duty it is to prosecute such order is to send to each creditor, or his solicitor (if any,) a notice that the cheques may be obtained from the Registrar; and such notice may be in form No. 6 in schedule V, and such party is, when required, to produce any papers necessary to enable the creditors to receive their cheques. (20th Dec. 1865; Ord. 32.)

487. Every notice by these Orders, required to be given is, unless the Master otherwise directs, to be deemed sufficiently given and served if transmitted by post, prepaid, to the creditor to be served, according to the address given by the creditor in the claim sent in by him pursuant to the advertisement, or, in case the creditor has employed a solicitor, to such solicitor, according to the address given by him. (20th Dec. 1865; Ord. 33.)

XXXVII.—ALIMONY SUITS.

488. Where the plaintiff in an alimony suit requires interim alimony, and costs, there is to be endorsed on the office-copy of the bill served, or served therewith, a notice to the following effect: "Take notice that the plaintiff demands as interim alimony, until the hearing of this cause, the monthly (*or* weekly) sum of \$ to be paid to her on the day of each month (*or* week) at , and costs, according to the rules of the Court."

As to Alimony suits, see Con. Stat. U. C., c. 12, s. 29 and notes.

489. No application for interim alimony, or costs, is to be made until the time for answering has expired.

490. The defendant may, at any time before the answer is due, give notice in writing that he submits to pay the interim alimony, and costs, as demanded by the notice; and in that case no order is to be taken out until there has been a default in payment; and in case of default, affidavits being filed verifying the two notices and the default, the order is to be issued on precipe.

491. The interim costs to the serving of the bill and notice inclusive, are to be \$20; and thence to the hearing inclusive, (in a contested suit,) the further sum of \$40, exclusive of mileage on serving papers and witnesses' fees; and if the defendant pays the former sum to the plaintiff's solicitor on or before the day his answer is due, and the latter sum on or before the day for which the cause is set down to be heard, and pays the mileage and witnesses' fees when demanded of his solicitor, no order is to be made for interim costs, except of applications to the Court.

XXXVIII.—QUIETING TITLES.

492. Under the Act for Quieting Titles to Real Estate in Upper Canada, the petition for an investigation of title is not to include two or more properties dependant on separate and distinct titles; but may include any number of lots or parcels belonging to the same person, and dependant on one and the same chain of title. (31st Aug. 1867; Ord. 1.)

In the petition a loose indefinite description of the property as "part of lot,—" not saying what part should be avoided. If the land has been for some time in the occupation of any person, it may be proper to state, "now and for some time occupied by——." So if it adjoins any well known property, or property occupied by some public company, it may be advisable to describe it as so adjoining.

In the body of the petition the description should be as certain as the conveyance, to identify the land claimed with the Registrar's certificate, and in order that the certificate of title may follow it. For the same reasons the petition should properly describe the estate or interest in the land claimed by the petitioner.

493. Where an application is made under the second section of the Act, the Clerk of Records and Writs is to attend one of the Judges with the petition for directions, before the same is referred for investigation. (31st Aug. 1867; Ord. 2.)

The first section of the Act for Quieting Titles enables any owner of an estate in fee simple in land in Upper Canada, or any trustee for the sale of the fee simple to have his title judicially investigated. By the second section a Judge is given a discretion to permit "any other person who has any estate or interest, legal or equitable, in or out of land in Upper Canada," to apply for the investigation of his title, and a declaration of the validity thereof.

494. A petition under the Act may, at the option of the petitioner, be referred to any of the officers of the Court at Toronto, or to any conveyancing Counsel, who may from time to time be designated by the Court for the purpose; or to any of the following Local Masters, viz, the Masters at Barrie, Belleville, Brantford, Brockville, Cobourg, Cornwall, Goderich, Guelph, Hamilton, Kingston, Lindsay, London, Ottawa, Owen Sound, Peterborough, Sandwich, Sarnia, Simcoe, Stratford, St. Catharines, Whitby, and Woodstock; or to any other of the Local Masters who shall hereafter be designated. (31st Aug. 1867; Ord. 3.)

495. To facilitate the proceedings in cases referred to the Local Masters, one or more Inspectors of Titles will be named by the Court, for the purposes, and with the powers mentioned in and provided for by the 25th and 26th sections of the said Act; and on the petition are to be endorsed the names of the Inspector, or one of the Inspectors, as the case may be, and of the Local Master,

thus: "To be referred to the Master at _____, and to Mr. _____, Inspector of Titles." (31st Aug. 1867; Ord. 4.)

496. Petitions filed unendorsed with the name of a Referee, are to be referred to the Referee, in Toronto or to one of the Referees in Toronto (if more than one) in rotation or otherwise as the Court from time to time directs; but a petition indorsed with the name of any Referee is to be referred to him accordingly, unless the Court otherwise directs. (31st Aug. 1867; Ord. 5.)

497. Where the petitioner desires the reference to a Local Master, the petition is to be entered with the Inspector of Titles before being filed as required by the Statute, and the Inspector is to note thereon the day of entering the same, adding to such note his own initials, and is thereupon to deliver the petition to the solicitor, or, if duly stamped, to the Registrar, to be filed. (31st Aug. 1867; Ord. 6.)

498. The Local Master shall be entitled to confer or correspond from time to time with the Inspector of Titles, for advice and assistance on questions of practice or evidence, or other questions arising under the Act or under these Orders. (31st Aug. 1867; Ord. 7.)

499. The Clerk of Records and Writs is to deliver to the party filing a petition under the Act, a certificate of the filing thereof, for registration in the proper County; and thereupon the petition is forthwith to be referred and delivered or posted by the Clerk of Records and Writs to the Referee named for that purpose. (31st Aug. 1867; Ord. 8.)

Until the certificate of filing the petition is registered the particulars required by sec. 5 of the Act cannot be delivered to the referee, as until then certified copies of memorials "up to the time of the registering of

a certificate of the petition" as required by sec. 5, sub-sec. 2, cannot be procured.

500. The particulars necessary under the fifth section of the Act to support the petition are to be delivered or sent by the petitioner or his solicitor to the Referee, and are to be forthwith examined and considered by him. (31st Aug. 1867 ; Ord. 9.)

See notes to 29 Vic. c. 25, s. 5.

501. In every case of an investigation of the title to property under the said Act, the petitioner is to shew, by affidavit or otherwise, whether possession has always accompanied the title under which he claims the property, or how otherwise, or is to shew some sufficient reason for dispensing with such proof either wholly or in part. (31st Aug. 1867 ; Ord. 10.)

502. Where there is no contest, the attendance of the petitioner, or of any solicitor on his behalf, is not to be required on the examination of the title, except where, for any special reason, the Referee directs such attendance. (31st Aug. 1867 ; Ord. 11.)

503. If, on such examination as aforesaid, the Referee finds the proof of title defective, he is to deliver or mail to the petitioner, or to his solicitor or agent, a memorandum of such finding, stating shortly therein what the defects are. (31st Aug. 1867 ; Ord. 12.)

504. When the Referee finds that a good title is shewn, he is to prepare the necessary advertisement, and the same is to be published in the official *Gazette* and in any other newspaper or newspapers in which the Referee thinks it proper to have the same inserted ; and a copy of the advertisement is also to be put up on the door of the Court House of the County where the land lies, and, unless the nearest Post Office is in a city, in some

conspicuous place in the Post Office which is situate nearest to the property the title of which is under investigation; and the Referee is to endorse on the advertisement so prepared by him, the name or names of the newspaper or newspapers in which the same is to be published, and the number of insertions to be given therein respectively, and the period (not less than four weeks) for which the notice is to be continued at the Court House and Post Office respectively. (31st Aug. 1867; Ord. 13.)

One or at most two insertions in the *Gazette* will usually be sufficient.

505. Any notice of the application to be served or mailed under the fourteenth section of the Act, is to be prepared by the Referee; and directions are in like manner to be given by him as to the persons to be served with such notice, and as to the mode of serving the same. (31st Aug. 1867; Ord. 14.)

Sec. 14 requires, in cases where there appears to exist any claim adverse to or inconsistent with that of the petitioner to or in respect of any part of the land, that the Judge shall direct such notice as he deems necessary to be mailed to or served on the adverse claimant, his solicitor, attorney, or agent.

506. The Inspector, or Toronto Referee, is from time to time to confer with one of the Judges in respect of matters before such Inspector or Toronto Referee, as there shall be occasion. (31st Aug. 1867; Ord. 15.)

507. When any person has shewn himself, in the opinion of a Local Master, to be entitled to a certificate or conveyance under the Act, and has published and given all the notices required, the Master is to write at the foot of the petition, and sign, a memorandum to the following effect: "I am of opinion that the petitioner is entitled to a certificate of title (*or conveyance*) as prayed" (*or subject to the following incumbrances, &c., as the*

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case may be); and is to transmit the petition (if by mail, the postage being prepaid,) with the deeds, evidence, and other papers before him in reference thereto, to the Inspector of Titles with whom the petition was entered; and the Inspector is to examine the same carefully, and should he find any defect in the evidence of title, or in the proceedings, he is, by correspondence or otherwise, to point the same out to the petitioner, or his solicitor, or to the Master, as the case may be, in order that the defect may be remedied before a Judge is attended with the petition and papers for approval. (31st Aug. 1867; Ord. 16.)

508. When the Inspector, or other Referee (not being a Local Master,) finds that the petitioner has shewn himself entitled to a certificate of title, or a conveyance under the Act, and has published and given all the notices required, the Inspector, or Referee (not being a Local Master,) is to write at the foot of the petition, and sign a memorandum to the same effect as is required from a Local Master, and is to prepare the certificate of title, or conveyance, and is to engross the same in duplicate, one being on parchment or parchment paper; and is to sign the same respectively at the foot or in the margin thereof; and is to attend one of the Judges therewith, and with the deeds, evidence, and other papers before him in reference thereto; and on the certificate or conveyance being signed by the Judge, the Inspector or other Referee aforesaid, as the case may be, is to procure the same to be signed by the Registrar, and registered; and the Clerk of Records and Writs is to deliver or transmit the same, when so signed and registered, to the petitioner, his solicitor, or agent, for registration in the proper County. (31st Aug. 1867; Ord. 17.)

509. When a certificate of title or conveyance under the Act has been granted, the Inspector or Referee may,

without further order, deliver, on demand, to the party entitled thereto, or his solicitor, all deeds and other evidences of title, not including affidavits made, and evidence given in the matter of the title; and is to take his receipt therefor. (31st Aug. 1867; Ord. 18.)

510. Every Inspector and other Toronto Referee is to keep a book, and to preserve therein a copy of all his letters under these Orders, and is to prepare monthly, for the information of the profession, a memorandum of points of practice decided in matters under the Act. (31st Aug. 1867; Ord. 19.)

511. The fees of solicitors and counsel, and the fees payable by stamps, for proceedings under the said Act, are, respectively, to be the same as for like proceedings in suits. (31st Aug. 1867; Ord. 20.)

512. The Referee is, in lieu of all other fees, to be entitled to a fee of fifty cents for every deed in the chain of title, other than satisfied mortgages; and Referees who prepare the certificate or conveyance, are to have a fee of four dollars, for drawing and engrossing the same in duplicate. Besides these fees, the Referee is to have the same fees in respect of proceedings occasioned by any defects in the proof of title, which shall be mentioned in the Referee's memorandum referred to in Order 503, as are payable to the Master in respect of similar proceedings in suits. No further or other fee is to be payable to the Referee in respect of any of the proceedings by or before him under the said Act in an uncontested case. (31st Aug. 1867; Ord. 21.)

513. In a contested case, the Referee is, in addition, to be entitled, in respect of the proceedings occasioned by the contest, to the same fees therefor as are payable to him for the like proceedings in suits. (31st Aug. 1867; Ord. 22.)

514. The fee of the Inspector of Titles on entering the petition with him is eight dollars, and no further fee is to be paid him for correspondence, examination of the title, drawing and engrossing certificate or conveyance, or for any other matter or thing done under the petition. (31st Aug. 1867; Ord. 23.)

515. The applicant or his solicitor is to pay, or prepay, as the case may be, all postages and other expenses of transmitting letters or papers. (31st Aug. 1867; Ord. 24.)

516. Petitions under the thirty-fifth section of the Act are to be filed and proceeded with in the same manner (as nearly as may be) as petitions for an indefeasible title and the fees of officers, solicitors, and counsel, are to be the same as in respect of the like proceedings in suits. (31st Aug. 1867; Ord. 25.)

XXXIX.—INFANTS AND PERSONS OF UNSOUND MIND.

517. In the case of an infant defendant, under the age of ten years, a copy of the bill of complaint is not to be served on the infant personally, but is to be delivered to, or left at the dwelling-house of, the person with whom, or under whose care, the infant is residing at the time of the service; and if more defendants than one under the said age live with, or under the care of, the same person, one copy only is to be served for all such infant defendants. (20th Dec. 1865; Ord. 1.)

518. An order to take a bill *pro confesso*, against a defendant who at the time of the making of such order is an infant, or person of weak or unsound mind, unable of himself to defend the suit, is of no validity. (3rd June, 1853; Ord. 13, s. 5.)

519. In case it shall appear to the Court that any defendant upon whom an office-copy of a bill has been served is an infant, or a person of weak or unsound mind not so found by inquisition, unable of himself to defend the suit, the Court, upon the application of the plaintiff, at any time after bill filed, may order that one of the solicitors of the Court be assigned guardian of such defendant, by whom he may answer the bill and defend the suit. (3rd June, 1853; Ord. 13, s. 5.)

Notice should be served on, or left at the dwelling house of the person under whose care the defendant is, *Taylor v. Ansley*, 9 Jur. 1055; and where the father and mother of the infant were living apart, and the infant had absconded and could not be found to be served, notice was directed to be served at the residence of the mother, that being the last place of residence of the infant, *Bigger v. Beaty*, 1 Cham. R. 236; service on the head of a College of which the defendant was an under graduate, held good service, *Christie v. Cameron*, 4 W. R. 589; *Whitmarsh v. Ford* 1 Cham. R. 357. Where the infant is a married woman a guardian must be appointed, *Colman v. Northcote*, 2 Hare, 147.

Though the rule applies to infants residing abroad, *O'Brien v. Maitland*, 10 W. R. 275; *Anderson v. Stather*, 10 Jur. 383; yet where an infant defendant, having no substantial interest in the suit, was abroad, service of notice of the application was dispensed with, *Lambert v. Turner*, 10 W. R. 335; *Turner v. Sowden*, 2 Dr. & Sm. 265; and see *Chaffers v. Baker*, 5 D. M. & G. 482; *Lingren v. Lingren*, 7 Beav. 66.

Where an absent defendant is an infant the Court has like powers as to granting an order for service by publication as in case of an adult, *Duffy v. O'Connor*, 1 Cham. R. 393.

Where a guardian *ad litem* dies or leaves the Province, a new one will be appointed without notice, *Harper v. Harper*, 1 Cham. R. 217; *Weldon v. Templeton*, 1 Cham. R. 360.

The Court will not, even at the request of the infant defendants, in an amicable suit, appoint the plaintiff's solicitor their guardian, *James v. Robertson*, 1 Cham. R. 197.

On moving to have a guardian *ad litem* appointed to a person of unsound mind, it must be shewn that he has not been so found by inquisition. *Crawford v. Bidsall*, 1 Cham. R. 70.

Where the lunatic has been so found by inquisition, the committee of his estate generally applies to be appointed guardian, to answer and defend the suit which is ordered of course, 1 *Daniell's Chan. Pr.* 172; but if

he has no committee, or the committee has an adverse interest, a guardian will be appointed, *Howlett v. Wilbraham*, 5 Mad. 423; *Worth v. McKenzie*, 3 Mac. & G. 383.

520 Notice of the application must be served upon, or left at the dwelling-house of, the person with whom, or under whose care the defendant resides, at least one week before the hearing of the application; and where the defendant is an infant, not residing with or under the care of his father or guardian, notice of the application must also be served upon, or left at the dwelling house of, the father or guardian, unless the Court at the time of hearing the application, thinks fit to dispense with such service. (3rd June, 1853; Ord. 13, s. 5.)

See notes to preceding order.

521. Notice of application for the appointment of a guardian *ad litem* to an infant defendant of the age of fourteen years or upwards, is to be served upon such infant personally, unless the Court otherwise directs, and is also to be served as directed by the preceding Order. (20th Dec. 1865; Ord. 2.)

522. When infants, or persons of unsound mind not so found by inquisition, are made parties to suits after decree, or are served with notice of motion under Order 467, guardians *ad litem* are to be appointed for them in like manner as they are now appointed at any time after bill filed. (8th Nov. 1856.)

It is no bar to the appointment of a guardian *ad litem* to an infant defendant, in an administration suit commenced by notice of motion, that the application for a guardian is made before the return of the notice of motion for administration, *Barry v. Brazil*, 1 Cham. R. 237.

523. Where a person required to be served with an office-copy of a decree, pursuant to Order 60, is an infant, or a person of unsound mind not so found by inquisition, the service is to be effected upon such person or persons,

and in such manner, as the Master before whom the reference under the order is being prosecuted directs. (1st April, 1867; Ord. 10.)

524. At any time during the proceedings before a Master under an order, the Master may, if he thinks fit, require a guardian *ad litem* to be appointed for any infant, or person of unsound mind not so found by inquisition, who has been served with an office-copy of the decree. (1st April, 1867; Ord. 11.)

525. Guardians *ad litem* for infants or persons of unsound mind not so found by inquisition, who shall be served with an office-copy of a decree, are to be appointed in like manner as guardians *ad litem* to answer and defend, are appointed in suits on bill filed. (1st April, 1867; Ord. 12.)

526. A person desirous of appointing a guardian for him to defend a suit, may go before a Judge or Master with the proposed guardian if he thinks fit to do so. But he must satisfy the Judge or Master by affidavit that the proposed guardian is a fit person and has no interest adverse to that of the person of whom he is to be the guardian in the matter in question; and if the affidavit is not sufficient for this purpose, the Judge or Master may examine the proposed guardian, or the person making the affidavit, *viva voce*, or require further evidence to be produced until he is satisfied of the propriety of the appointment. (6th June, 1853; Ord. 2.)

527. A petition for the sale or other disposition of the real estate of an infant, is to be intituled in the matter of the infant. (3rd June, 1853; Ord. 37, s. 1.)

See notes to Con. Stat. U. C., c. 12, ss. 50, 51, 52, 53, 54, and 55.

528. The petition is to be presented, in the name of the infant, by his guardian, or by a person applying by the

same petition to be appointed guardian, as hereinafter provided. (3rd June, 1853; Ord 37, s. 2.)

529. The petition is to state the nature and amount of the personal property to which the infant is entitled—the necessity of resorting to the real estate—its nature, value and the annual profits thereof. It must also state circumstances sufficient to justify the sale or other disposition of the estate, and the application of the proceeds in the manner proposed. The prayer must state specifically the relief that is desired; it must designate the lands to be disposed of, and must propose a scheme for that purpose, and for the appropriation of the proceeds. If an allowance for the maintenance is desired, it must be so prayed, and a case must be stated to justify such an order, and to regulate the amount. 3rd June, 1853; Ord. 37, s. 3.)

530. The petition may pray for the appointment of a guardian, as well as for the disposal of the Infant's estate. In that case a proper case must be made by the petition, and established by the evidence, for the appointment of the person proposed. (3rd June, 1853; Ord. 37, s. 3.)

531. Upon all petitions for the sale of an infant's estate, the infant is to be produced before a Judge in Chambers, or before a Master. (3rd June, 1853; Ord. 37, s. 5.)

532. Where the infant is above the age of seven years he is to be examined, apart, by the Judge or Master, upon the matter of the petition, and as to his consent thereto, as required by the Statute; and his examination is to be stated to have been taken under this Order, and is to be annexed to and filed with the petition. Where the infant is under the age of seven years, the fact is to be certified by the Judge or Master before whom he is produced. (3rd June, 1853; Ord. 37, s. 6.)

533. The witnesses to verify the petition are also to be produced before the Judge, or Master, and are to be examined *viva voce* to the matter of the petition, and the depositions so taken are to be stated to have been taken under this Order. (3rd June, 1853 ; Ord. 37, s. 7.)

534. The Masters of the Court are authorized to examine infants and witnesses under the preceding Order, without special order or reference. (3rd June, 1853 ; Ord. 37, s. 8.)

535. Upon a petition so verified, the Court may either grant the relief prayed at once, or make such order as to further evidence, or otherwise, as the circumstances of the case require. (3rd June, 1853 ; Ord. 37, s. 9.)

536. Where, by an order, a day is reserved for an infant defendant to shew cause, it shall not be necessary to issue a subpoena to shew cause against the order, but the plaintiff is to serve the defendant after he attains twenty-one years of age, with an office-copy of the order, endorsed with a notice in the form set forth in schedule W.

See notes to Order 434.

537. Committees of the persons and estates of lunatics, idiots, and persons of unsound mind, and guardians, excepting guardians *ad litem*, are to be appointed in the same manner as Receivers, as nearly as circumstances will permit. (3rd June, 1853 ; Ord. 38, s. 2.)

For the mode of appointing a Receiver, see Ord. 278 *et seq.*

XL.—MISCELLANEOUS.

538. No suit is to be open to objection on the ground that a merely declaratory decree or order is sought thereby ; and the Court may make a binding declaration of right without granting consequential relief. (3rd June, 1853 ; Ord. 28.) (*Imp. Act, 15 & 16 V., c. 86, s. 50.*)

It has been held by L. J. Turner that the Court has no power, under this order, to declare future rights, *Lady Langdale v. Briggs*, 8 D. M. & G. 391; and the Court has refused to make declarations as to the interests of parties entitled in reversion, *Garlick v. Lawson*, 10 Hare, App. 14; *Greenwood v. Sutherland*, *Ibid*, 12. Such declaration will not be made, except where necessary for the administration of an estate, or in order to grant relief, *Gosling v. Gosling*, 1 John, 265; *Fyfe v. Arbuthnot*, 1 DeG. & J. 406; *Bell v. Cade*, 10 W. R. 38.

Where some of the parties are infants, and therefore unable to bind themselves, the Court has no power, even by consent, to decide a purely legal question, so as to bind the infants, *Webb v. Byng*, 8 D. M. & G. 633.

A plaintiff cannot have a prospective declaration guarding against a claim which may never be made, *Jackson v. Turnley*, 1 Drew. 617; nor a decree declaratory of a merely legal right, *Trustees of Birkenhead Dock v. Laird*, 18 Jur. 583.

This order does not apply unless the plaintiff would be entitled to consequential relief if he chose to ask it, *Rooke v. Lord Kensington*, 2 K. & J. 763; *Bristow v. Whitmore*, 4 K. & J. 743; *Macklem v. Cummings*, 7 Grant, 318; when a declaration is asked and also an injunction, such injunction is consequential relief, *Marsh v. Keith*, 1 Dr. & Sm. 342; 9 W. R. 115.

539. Where, according to the former practice, the Court was in the habit of refusing equitable relief until the party seeking such relief had established his legal title or right in a proceeding at law, the Court will itself determine such title or right without requiring the party seeking relief to proceed at law to establish the same; but the Court may require the right or title to be established at law, whenever it considers that course expedient. (3rd June, 1853; Ord. 26.)

Where the Court requires an action at law to be brought to establish the right or title of the party seeking relief, an application for a new trial must be made to the Court of Law in which the action is brought, and not to the Court of Chancery, *Hope v. Hope*, 10 Beav. 581.

Where the claim of a creditor is disputed in an administration suit, the Court cannot direct an action at law, but must try the whole question. *Baylis v. Watkins*, 8 Jur. N. S. 1165.

540. In all cases where, according to the present practice, a reference to the Master would be directed, the Court may dispose of such matters itself, if it thinks fit,

and may direct the proceedings to be taken in full Court, or in Chambers, as it finds expedient. (3rd June, 1853; Ord. 33, s. 1.)

541. The Court may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, in such way as it thinks fit, the better to enable it to determine any matter in evidence in any cause or proceeding, and may act on the certificate of such persons. (3rd June, 1853; Ord. 33, s. 2.) (*Imp. Act*, 15 & 16 V., c. 80, s. 42.)

As to the effect of the powers given by this section in extending the jurisdiction of Equity, see *McIntosh v. Great Western Railway Co.*, 3 Sm. & G. 146; *Mildmay v. Methuen*, 1 Drew. 216; 18 Jur. 965. As to the employment of accountants, *Re London, Birmingham & Bucks Rail. Co.*, 6 W. R. 141; and they need not always be employed in the presence of the parties, *Ibid.*

542. Where on a proceeding before an officer of the Court, pleadings or other documents, filed with another officer of the Court, are required, the officer with whom he pleadings or other documents are filed, is, upon production of a certificate signed by the officer requiring the pleadings or other documents, that the same are required for some proceeding before him, to transmit the pleadings or other documents mentioned in the certificate.

Where pleadings or other documents are required at the hearing, their transmission may be procured under Order 165.

Where documents are required in another Court, the Court will not order production of the original document unless satisfied that an office copy is insufficient, *Jervis v. White*, 8 Ves. 313; *Attorney-General v. Ray*, 6 Beav. 335; 2 Ha. 518; 3 Ha. 335; *Anon*, 13 Beav. 520; and the application for an order must be on notice, *Lamb v. Danby*, 9 W. R. 765.

543. Where such documents are to be transmitted from one officer of the Court in Toronto to another, they are to be transmitted by delivering the same to the officer requiring the same, or his clerk.

544. Where such documents are to be transmitted by an officer of the Court in Toronto to one in an outer County, or from an officer in an outer County to one in Toronto, they are to be sent by parcel post, or by express, and, before they are sent, the party requiring their transmission is to deposit a sufficient sum to cover the expense of transmission, and of re-transmission to the office from which they are sent.

545. As soon as the purpose for which any such documents are required is completed, the officer to whom they have been sent is to re-transmit them to the office from which they were sent.

546. All defences are to be presented to the Court by demurrer or answer, or both, according to circumstances. (3rd June, 1853; Ord. 10.)

XLI.—SUPPLEMENTARY ORDERS.

547. Office copies of decrees to be served on persons made parties in the Master's office, may be certified by the Deputy Registrar at the place where the reference is being prosecuted. (5th Oct. 1859.)

548. A party requiring a copy of any pleading or affidavit is to make a written application for the same to the solicitor of the party by whom it has been filed, or on whose behalf it is to be used; and where the party has no solicitor, then to the party himself. (3rd. June, 1853; Ord. 43, s. 4.)

Taking an office-copy of an answer for want of which defendant is in contempt is a waiver of the contempt, *Herritt v. Reynolds*, 6 Jur. N. S. 880.

An irregularity in the endorsement on a pleading of the name and place of business of the solicitor filing it, is waived by demanding and receiving a copy of the pleading, *Bennett v. O'Meara*, 2 Cham. R. 167.

548. Where an application is made for a copy of any pleading or affidavit, it is to be delivered within forty-eight hours from the time of the demand; and any further time which may elapse before the delivery is not to be computed against the party demanding the same. (3rd June, 1853; Ord. 43, s. 4.)

The order to furnish an office-copy of a pleading or affidavit, when demanded, is imperative, and the Court will enforce compliance with it. *Totten v. Macintyre*, 2 Cham. R. 80. If copies of affidavits are demanded it is imperative on the party filing the affidavits to furnish them, and the costs of any delay occasioned by his not doing so fall on the party making default, *Burrows v. Hainey*, 2 Cham. R. 183.

DECLARATORY ORDERS.

17TH OCTOBER, 1868.

550. In Orders 88 and 120, the word "month" is to be read as lunar month; in Order 200 the word "shall" is to be read as permissive; in Order 288 the words "with the Registrar" are to be struck out; and in Schedules C. D. N. and S. the word "Registrar" is to be struck out wherever the same occurs, and the words, "Clerk of Records and Writs" inserted in lieu thereof.

551. In accordance with the practice heretofore prevailing in the office of the Registrar, the fee of \$2, payable on setting down a cause with the Clerk of Records and Writs, is to be payable only on the setting down of causes for examination and hearing, or motion for decree, or on bill and answer; in all other cases the fee on setting down a cause is to be fifty cents.

The following fees, which before the naming of a Clerk of Records and Writs, were payable to the Registrar, are

now to be payable in the office of the Clerk of Records and Writs : —

Every Certificate for Registration	0.50
Enrolling Order	0.50
Drawing Order, per folio	0.20
Entering same when necessary, per folio	0.10
Entering Certificate of Title or Conveyance, per fo.	0.10

552. A notice of motion under Order 467, is to be served upon all proper parties at least fourteen days before the day named for hearing the application.

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SCHEDULES.

SCHEDULE A.

Endorsement on Office-Copy of a Decree, served under Order 60.

"Take notice, that from the time of the service hereof, you (*or, as the case may be, the infant, or person of unsound mind*) will be bound by the proceedings in this cause in the same manner as if you (*or, the said infant, or person of unsound mind*) had been originally made a party to the suit : and that you (*or, the said infant, or person of unsound mind*) may, upon service of notice upon the plaintiff, attend the proceedings under the within decree ; and that you (*or, the said infant, or person of unsound mind*) may, within fourteen days after the service hereof, apply to the Court to add to, vary, or set aside the said decree : A. B., of the City of Toronto, in the County of York, Plaintiff's Solicitor.

SCHEDULE B.

Forms of Bills, referred to in Order 75.

1. By a legal or equitable mortgagee, or person entitled to a lien as a security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.

IN CHANCERY.

Between A. B.,.....Plaintiff,

and

C. D.,.....Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B., of the City of Toronto, in the County of York, Merchant ;

SHEWETH AS FOLLOWS :

1. Under and by virtue of an Indenture (*or other document,*) dated, &c., and made, &c., (*and a transfer thereof, made by inden-*

ture, dated, &c., and made, &c.,) the plaintiff is a mortgagee (or, an equitable mortgagee) of (or, is entitled to hold a lien upon) certain freehold property (or leasehold, or other property, as the case may be) therein comprised, being (insert a general description of the property), for securing the sum of \$—— and interest :

2. The time for payment has elapsed, and no sum has been paid on account of principal or interest, (or, \$—— has been paid on account of principal, and \$—— on account of interest).

3. There is now due under and by virtue of the said Indenture of mortgage, for principal money the sum of \$——, and for interest the sum of \$——.

4. The plaintiff has not been in occupation of the said mortgaged premises, or of any part thereof, (or, the plaintiff has been in the occupation of the premises, or of some part thereof, from the —— day of —— in the year —— to the —— day of —— in the year ——).

5. The defendant C. D., is entitled to the equity of redemption in the said lands (or, the premises subject to such lien).

The plaintiff therefore prays :

That he may be paid the said sum of \$——, and interest thereon, and the costs of this suit ; and in default thereof, that the equity of redemption in the said lands may be foreclosed.

(Or, that in default thereof the said mortgaged premises may be sold and the produce thereof applied in or towards payment of the said debt and costs).

(That the Defendant C. D. may be ordered to pay the balance of the said mortgage debt and costs after deducting the amount realized by such sale).

That for the purposes aforesaid all proper directions may be given and accounts taken.

That the plaintiff may have such further or other relief as the nature of the case may require.

And the plaintiff will ever pray.

2. By a person entitled to the redemption of any legal or equitable mortgage, or any lien, seeking to redeem the same.

IN CHANCERY.

Between A. B., Plaintiff,
and
C. D., Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B., &c.

SHEWETH AS FOLLOWS :

1. Under and by virtue of an Indenture (or other document) bearing date, &c., and made between (parties) the plaintiff is entitled to the equity of redemption in certain freehold property comprised, being (insert description of property) which was originally mortgaged for securing the sum of ———— and interest thereon.

2. The defendant C. D., is now, by virtue of the said Indenture dated the ———— day of, &c., the mortgagee of the said lands, and entitled to receive the principal money and interest remaining due upon the said mortgage.

3. The amount of the principal money and interest now due upon the said mortgage is the sum of ———— or thereabouts.

4. The plaintiff has made, or caused to be made, an application to the said C. D., to receive the sum of ————, and any costs justly payable to him, and reconvey the said mortgaged property to the plaintiff upon payment thereof, and of any costs due to him in respect of the said security, but the said C. D., has not so done.

The plaintiff therefore prays :

That he may be let in to redeem the said mortgaged property, and that the same may be re-conveyed to him

upon payment of the principal money and interest and costs due and owing upon the said mortgage.

That for the purposes aforesaid all proper directions may be given and accounts taken.

That the plaintiff may have such further or other relief as the nature of the case may require.

And the plaintiff will ever pray.

3. By a person entitled to an account of the dealings and transactions of a partnership dissolved or expired, seeking such account.

IN CHANCERY.

Between A. B.,.....Plaintiff,
and
C. D.,.....Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B., &c.

SHEWETH AS FOLLOWS :

1. From the———day of———down to the———day of———the plaintiff and the defendant C. D., carried on the business of———in partnership under certain articles of co-partnership dated, &c., and made between———[parties], [or under a verbal agreement made between the plaintiff and C. D., or through their respective agents E. F. and G. H.]

2. The said co-partnership was dissolved (or expired) on the———day of———.

The plaintiff therefore prays :

That an account of the partnership dealings and transactions, between the plaintiff and the said C. D. may be taken, and the affairs and business of the said partnership wound

up and settled under the direction
of this Honourable Court.

That for the purposes aforesaid all
proper directions may be given and
accounts taken.

That the plaintiff may have such
further or other relief as the nature
of the case may require.

And the plaintiff will ever pray.

4. For dissolution of co-partnership.

IN CHANCERY.

Between A. B.,.....Plaintiff.

and

C. D.,.....Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B., &c.

SHEWETH AS FOLLOWS :

1. The plaintiff and the defendant C. D., are and have been
since the——day of——co-partners in the trade or business
of——under articles of co-partnership dated, &c., and made
between, &c., (or, under a verbal agreement made, &c.) which
partnership was to continue for——years (or for an indefinite
time.)

2. The said business was carried on under the said agreement
until——without any difficulty warranting dissolution.

3. From the last mentioned day until the present time the said
C. D. has greatly misconducted himself in the said business, by re-
moving the books of the co-partnership from the shop or counting
house of the firm, and denying the plaintiff or debarring him from
access thereto, by discharging the clerks and servants of the said
firm and engaging others in his own interest in their room ; by
making false entries in the said books, or improperly keeping the
same.

4. The said defendant has also used the name of the firm for his own private purposes, and has applied the moneys of the partnership to his own individual use.

5. There is nothing in the said articles or agreement of co-partnership to justify such conduct on the part of the defendant.

6. The plaintiff has made frequent applications to the said defendant to desist from such conduct and to act in accordance with the said agreement and with his duty as a partner, but without effect.

7. The plaintiff, on the _____ day of _____ gave notice to the said defendant that the said partnership would be dissolved from the _____ day of _____.

The plaintiff therefore prays :

That the said partnership may be dissolved, and that the accounts of the said business may be taken from the commencement thereof, and the affairs thereof wound up and adjusted.

That the plaintiff may have such further or other relief as the nature of the case may require.

And the plaintiff will ever pray.

5. Bill by a person entitled to specific performance of an agreement for the sale or purchase of any property, seeking such specific performance.

IN CHANCERY.

Between A. B., Plaintiff,

and

C. D., Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B., &c.,

SHEWETH AS FOLLOWS :

1. By an agreement dated the _____ day of _____ and signed by the defendant C. D., the said defendant contracted

to buy of the plaintiff (or to sell him) certain freehold (or leasehold) property therein described or referred to, for the sum of——.

2. The plaintiff has made or caused to be made to the said C.D application specifically to perform the said agreement on his part, but he has not done so.

The plaintiff therefore prays :

That the said agreement may be specifically performed, and for that purpose that all proper directions may be given, the plaintiff hereby offering to perform the said agreement on his part.

That the plaintiff may have such further or other relief as the nature of the case may require.

And, &c.,

6. Bill for the specific performance of a parol agreement partly performed.

IN CHANCERY.

Between A. B.,.....Plaintiff,

and

C. D.,.....Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B., &c.

SHEWETH AS FOLLOWS.

1. The defendant C. D. being or pretending to be seised in fee simple in possession of lot No.—, in, &c., the plaintiff and the said C. D. on or about the——day of——entered into a verbal agreement for the purchase by the plaintiff of the said lot of land at or for the price or sum of——payable, &c., with interest, and upon payment thereof a proper conveyance was to be executed of the said premises free from incumbrances.

2. The plaintiff was accordingly admitted and entered into posses-

ion of the said lot and has continued in possession thereof ever since and is still in possession thereof.

3. The plaintiff has made divers and considerable improvements thereon and has paid the sum of——, part of the said purchase money.

4. The plaintiff submits that under the circumstances aforesaid the said agreement has been partly performed so as to entitle the plaintiff to a specific execution thereof.

5. The plaintiff made and caused to be made frequent applications to the said C. D. for the purpose of obtaining a specific execution of the said agreement, but without effect.

The plaintiff therefore prays :

That the said contract may be specifically performed by the said C. D., the plaintiff being ready and willing and hereby offering to perform the same in all respects upon his part.

That the plaintiff may have such further or other relief as the nature of the case may require.

And, &c.

7. Bill to stay waste.

IN CHANCERY.

Between A. B.,.....Plaintiff.

and

C. D.,.....Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B., &c.

SHEWETH AS FOLLOWS :

1. The plaintiff is and has been from before the acts hereinafter complained of until the present time seised in fee simple (*or, as the case may be*) under and by virtue of an Indenture, &c., bearing date &c., and made between, &c., of lot No.—, &c.

2. The defendant C. D. is in possession of the said lot as tenant for a term of ———— years (*or, as the case may be*) of the plaintiff under and by virtue of an Indenture of demise, &c., bearing date, &c., and made between, &c.

3. The said defendant has since the ———— day of ———— committed waste upon the said lot by cutting down and removing from off the said lot and applying to his own use a large number of the timber and other trees standing, growing, and being thereon, and also by quarrying a large quantity of stone being on and part of the said lot and by pulling down, &c., houses, &c.,

4. The defendant continues and threatens and intends to continue to commit such waste as aforesaid, and other waste and destruction of the said lot, although frequently requested by the plaintiff to desist therefrom.

The plaintiff therefore prays :

That the said C. D., may be restrained by the order and injunction of this Honourable Court from committing such waste as aforesaid, or any other waste, spoil, or destruction on the said premises, and may account for the waste already committed.

That the plaintiff may have such further or other relief as the nature of the case may require.

And, &c.

8. Bill to stay trespass in the nature of waste.

IN CHANCERY.

Between A. B.,.....Plaintiff,

and

C. D.,.....Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B., &c.

SHEWETH AS FOLLOWS :

1. The plaintiff was at the time of the acts hereinafter complained of and has been since up to the present time the owner in fee simple (or as the case may be) in possession of lot No.—, &c., under and by virtue of an Indenture, &c., and made, &c.

2. The defendant C. D. has from the———day of———until the present time continually trespassed upon the said lot by cutting down and removing from off the said lot and applying to his own use divers valuable timber and other trees which were growing standing, and being on the said lot.

3. The defendant continues and threatens and intends to continue to trespass on the said lot in like manner although frequently requested by the plaintiff to desist therefrom.

The plaintiff therefore prays :

That the said defendant may be restrained by the order and injunction of this Honourable Court from committing the acts aforesaid, and other acts of a like nature, and may account for the value of the timber and other trees cut down, removed and applied to his own use as aforesaid.

That the plaintiff may have such further or other relief as the nature of the case may require.

And, &c.

9. Bill by a person entitled to an equitable estate or interest and claiming to use the name of his trustee in prosecuting an action for his sole benefit.

IN CHANCERY.

Between A. B.,.....Plaintiff,

and

C. D.,.....Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B. &c.

SHEWETH AS FOLLOWS :

1. Under an Indenture dated, &c., and made between, &c., plaintiff is entitled to an equitable estate or interest in certain property therein described or referred to, and the defendant C. D., is a trustee for the plaintiff of the said property.

2. The plaintiff being desirous to prosecute an action at law against ——— in respect of such property, has made, or caused to be made, an application to the said defendant to allow the plaintiff to bring such action in his name and has offered to indemnify the defendant against the costs of such action.

3. The said defendant refuses to allow his name to be used by the plaintiff for the purpose of the said action.

The plaintiff therefore prays :

That he may be allowed to prosecute the said action in the name of the said defendant C. D., the plaintiff hereby offering to indemnify him against the costs of such action.

That the plaintiff may have such further or other relief as the nature of the case may require.

And, &c.

10. Bill by a person entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trust to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee.

IN CHANCERY.

Between A. B.,.....Plaintiff,
and
C. D.,.....Defendant.

CITY OF TORONTO.

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B., &c.

SHEWETH AS FOLLOWS :

1. Under an Indenture dated, &c., and made between, &c., (or the will of,) the plaintiff is interested in certain trust property there, in mentioned or referred to.

2. The defendant C. D. is the present trustee (or the real or personal representative of the last surviving trustee) of such property.

3. There is no power in the said Indenture (or will, &c.) to appoint new trustees (or the power in said will, &c., to appoint new trustees cannot be exercised.)

The plaintiff therefore prays :

That new trustees of the said trust property may be appointed in the place of (or to act in conjunction with) the said C. D.

That the plaintiff may have such further or other relief as the nature of the case may require.

And, &c.

SCHEDULE C.

*Endorsement on a Bill of Complaint, referred to in
Order 86.*

Your answer is to be filed at the office of the * [Registrar] at Osgoode Hall, in the City of Toronto, (or, when the bill is filed in an outer County, at the office of the Deputy Registrar at———).

You are to answer or demur within four weeks from the service hereof, (or, when the defendant is served out of the jurisdiction, within the time limited by Order 90.)

If you fail to answer or demur within the time above limited, you are to be subject to have such decree or order made against you as

the Court may think just, upon the plaintiff's own shewing; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause.

NOTE.—This Bill is filed by A. B., of the City of Toronto, in the County of York, solicitor for the above named plaintiff; (or where the party who files the bill is agent, say agent of E. F., of——— solicitor for the above named plaintiff.)

Notice in case of an absconding defendant, referred to in Order 100.

To the order directing publication, the following notice is to be added:—

C. D., take notice that if you do not answer or demur to the bill pursuant to the above order, the plaintiff may obtain an order to take the bill as confessed against you, and the Court may grant such relief as he may be entitled to on his own shewing, and you will not receive any further notice of the future proceedings in the cause.

Your answer is to be filed at the office of the *[Registrar] at Osgoode Hall, in the City of Toronto, (or, when the bill is filed in an outer county, at the office of the Deputy Registrar at———.)

* "Clerk of Records and Writs," see Ord. 550.

SCHEDULE D.

Affidavit of Service, referred to in Order 103.

IN CHANCERY.

Between A. B., Plaintiff,

and

C. D., Defendant.

I, ———, of ———, in the County of ———, make oath and say:

I did on the ——— day of ——— personally serve the above named defendant ——— with a paper which purported to be

an office-copy of the bill filed in this cause, by delivering to and leaving the said office-copy with the said defendant C. D., (*if served otherwise than personally, say, with a grown-up person, or, as the case may be, at the dwelling-house of the said C. D.,*) at ———, in the County of ———.

I further say, that the said office-copy purported to be authenticated by the signature of the * [Registrar] of this Court (or Deputy Registrar at ———) at the foot thereof; and that each page of the said office-copy was stamped with a stamp similar to the one which I now look upon in the margin of this affidavit.

I further say, that upon the said office-copy, at the time of service thereof there was endorsed the following memorandum :

"Your answer is to be filed at the office of the * [Registrar] at Osgoode Hall, in the City of Toronto, (or Deputy Registrar at ———).

"You are to answer or demur within four weeks from the service hereof.

"If you fail to answer or demur within the time limited, you are to be subject to have such decree or order made against you as the Court may think just upon the plaintiff's own shewing; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause.

"*Note*—This bill is filed by A. B., of the City of Toronto, in the County of York, Solicitor for the above named Plaintiff."

And I further say, that to effect the said service, I necessarily travelled ——— miles.

* "Clerk of Records and Writs," see Ord. 550.

SCHEDULE E.

Notice in case of an Absent Defendant, referred to in Order 108.

IN CHANCERY.

Between A. B.,.....Plaintiff,
and
C. D.,.....Defendant.

To the Defendant C. D.

Take notice, that a motion will be made in Chambers, at Osgoode Hall, in the City of Toronto, on the _____ day of _____ (the time fixed by the order authorizing publication,) that the bill in this cause may be taken as confessed against you; and such order having been made, the Court may grant to the plaintiff such relief as he may be entitled to on his own shewing; and you will not receive any further notice of the future proceedings in the cause.

Dated the _____ day of _____ A. D.

X. Y.

Plaintiff's Solicitor.

SCHEDULE F.

Form of Answer, referred to in Order 122.

IN CHANCERY.

Between A. B., Plaintiff,
and
C. D. and E. F., Defendants.

The answer of C. D., one of the above named defendants, to the bill of complaint of A. B., the above named plaintiff.

"In answer to the said bill I, C. D., says as follows :

1. "I admit (or, For the purposes of this suit I admit,) the truth of the allegations contained in the plaintiff's bill, or the allegations contained in the _____ paragraph of _____ or so much of the allegations contained in the _____ as commence with the words "_____, " and end with the words "_____, " or I admit, &c., save and except that I say, (stating qualifications of admissions, if any.)

2. "I believe that the defendant E. F. does claim to have a charge upon the farm and premises comprised in the indenture of mortgage of the _____ day of _____, in the plaintiff's bill mentioned.

3. "Such charge was created by an indenture dated, &c., made between myself of the one part, &c.

4. "To the best of my knowledge, remembrance and belief, there is not any other mortgage, charge, or incumbrance affecting the aforesaid premises."

[Such statements as are considered necessary or material are to be introduced with as much brevity as may consist with clearness ; and where a defendant seeks relief under Order 123, the answer is to ask the special relief to which he thinks himself entitled.]

Form of Jurat, referred to in Order 122.

Sworn before me at _____ in the County of _____ on the _____ day of _____, A. D.

SCHEDULE G.

Affidavit on production, referred to in Order 137.

IN CHANCERY.

Between A. B.,Plaintiff,
and
C. D.,Defendant.

I _____ of _____ make oath and say :—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto annexed.

2. I object to produce the said documents set forth in the second part of the said first schedule.

3. (State upon what ground the objection is made, and verify the fact as far as may be.)

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto annexed.

5. The last mentioned documents were last in my possession or power on (state when.)

6. (State what has become of the last mentioned documents, and in whose possession they now are.)

7. According to the best of my knowledge, remembrance, information and belief, I have not now and never have had in my own possession, custody or power, or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other person on my behalf, any deed, account, book of accounts, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or other document whatever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the first and second schedules hereto annexed.

Sworn, &c

SCHEDULE H.

Replication, referred to in Order 149.

IN CHANCERY.

Between A. B.,Plaintiff,
and

C. D., E. F., and G. H., Defendants.

I admit, &c., and I join issue with the answer of the defendant, C. D., except in so far as I have herein made admissions in regard to allegations contained in such answer, and I will hear the cause upon bill and answer against the defendant, E. F., and *pro confesso* against the defendant G. H., (as the case may be.)

SCHEDULE I.

Notice to Admit, referred to in Order 157.

IN CHANCERY.

Between A. B.,Plaintiff,
and

C. D.,Defendant.

Take notice, that the Plaintiff (or defendant) proposes to adduce in evidence the documents hereunder specified, and that the same may be inspected by the defendant, (or plaintiff,) his solicitor or agent, at——, &c., on——, &c., between the hours of——, &c. ; and the defendant (or plaintiff) is hereby required, within four days from the said day, inclusive, to admit that such of the said documents as are specified to be originals, were respectively written, signed or executed, as they purport respectively to have been ; that such as are specified as copies are true copies ; and that such documents as are stated to have been served, sent or delivered, were so served, sent or delivered, respectively ; saving all just exceptions to the admitting of such documents as evidence in this cause.

Dated this—— day of—— 186—.

Yours &c

To S.——, &c.
&c., &c.——.

SCHEDULE J.

Form of Order, referred to in Order 187.

The Court doth order that the following accounts and enquiries be taken and made by the Master of this Court, that is to say :

1st. An account of the personal estate not specifically bequeathed of A. B. deceased, the testator in the pleadings mentioned, come to the hands of, &c.

2nd. An account of the said testator's debts.

3rd. An account of the said testator's funeral expenses.

4th. An account of the said testator's legacies.

5th. An enquiry, what parts, if any, of the said testator's personal estate are outstanding or undisposed of.

And it is ordered that the said testator's personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses, in a due course of administration, and then in payment of his legacies.

(If ordered.)

And it is ordered that the following further accounts and enquiries be taken and made, that is to say :

6th. An enquiry what real estate the said testator was seised of or entitled to at the time of his death.

7th. An enquiry what incumbrances affect the said testator's real estate.

8th. An account of the rents and profits of the said testator's real estate received by, &c.

(If Sale ordered.)

9th. An account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances.

10th. An inquiry what are the priorities of such last mentioned incumbrances.

And it is ordered that the testator's real estate be sold, with the approbation of _____.

And it is ordered that further directions and costs be reserved, until after the said Master shall have made his report.

SCHEDULE K.

Appointment, referred to in Order 198.

IN CHANCERY.

Between A. B.,Plaintiff,

and

C. D.,Defendant.

The _____ day of _____ is hereby appointed to proceed (*here state the nature of the business for which the appointment is made*) when all parties are to attend at Chambers in Osgoode Hall, in the City of Toronto, at the hour of _____.

(To be signed by Judge, or Judges' Secretary).

NOTE.—If you do not attend either in person or by your solicitor, at the time and place above mentioned, such order will be made and proceedings taken in your absence, as may seem just and expedient.

G. H., Solicitor for — —

SCHEDULE L.

Endorsement on Office-Copy Decree, referred to in Orders 206, and 245.

To A. B., (the person upon whom service has been directed.)
(set out the order.)

If you wish to discharge the foregoing order, or to add to, vary, or set aside, the decree, you must do so within fourteen days from the service hereof. (When the order fixes a time for the further proceedings, add,) And if you fail to attend at the time and place appointed, either in person or by your solicitor, such order will be made and proceedings taken, in your absence, as may seem just and expedient; and you will be bound by the decree, and the further proceedings in the cause, in the same manner as if you had been originally made a party to the suit, without any further notice.

SCHEDULE M.

Jurat to Affidavit, referred to in Order 258.

Sworn before me at _____, in the County of _____, on the _____ day of _____, A.D. _____.

SCHEDULE N.

Endorsement on Order, served under Order 293.

"If you, the within named (here insert the name of the party,) neglect to obey this order by the time therein limited, you will be liable to be arrested by the Sheriff; and you will also be liable to have your estate sequestered for the purpose of compelling you to obey this order, without further notice. If you wish to apply to the Court to add to, vary, or set aside the said order, or to suspend the operation thereof, you must do so before the expiration of the time within limited."

Endorsement on Order of Revivor, served under Order 341.

"Take notice that if you desire to discharge this order, you must apply to the Court, by motion or petition, for that purpose, within fourteen days after the service hereof upon you. The original bill in this cause is filed in the office of the *[Registrar] (or Deputy Registrar, at ———; " (and if the service is after a decree directing a reference to a Master, add,) "and the reference under the decree in this cause is being prosecuted in the office of the Master at ———."

* Clerk of Records and Writs, see Ord. 550.

SCHEDULE O.***Precipe for Direction to the Bank, referred to in Order 353.***

IN CHANCERY.

(Short Style of Cause.)

Required, a direction to the Bank to receive from ———
\$ ———, payable into Court to the credit of this cause, under
—— dated ———, (or, as the case may be).

A. B., Defendant's Solicitor,

(Or as the case may be).

(Date).

Precipe for Cheque, referred to in Order 356.

IN CHANCERY.

(Short style of Cause).

Required a Cheque for \$ ——— [with \$ ——— interest thereon from ——— to ——— (being the period, if any, for which interest is payable under the Order, but which has not been already taken into account and computed)], payable to ———; and the following papers are produced herewith (naming the Decrees, Reports, &c., shewing the party's right to the Cheque, thus:

Decree dated ———.

Report dated ———, &c.)

A. B., Plaintiff's Solicitor,

(or as the case may be).

(Date).

SCHEDULE P.

Conditions of Sale, referred to in Order 379.

1. No person shall advance less than \$10 at any bidding under \$500, nor less than \$20 at any bidding over \$500, and no person shall retract his bidding.

2. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3. The parties to the suit, with the exception of the vendor, (and, naming any parties, trustees, agents, or others, in a fiduciary situation,) are to be at liberty to bid.

4. The purchaser shall, at the time of sale, pay down a deposit, in the proportion of \$10 for every \$100 of his purchase money, to the vendor, or his solicitor; and shall pay the remainder of the purchase money, ———, on the ——— day of ——— next; and upon such payment, the purchaser shall be entitled to the conveyance, and to be let into possession; the purchaser, at the time of sale, to sign an agreement for the completion of the purchase.

5. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6. If the purchaser fails to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon, shall be forfeited, and [the premises may be re-sold; and the deficiency, if any, by such re-sale, together with all charges attending the same, or occasioned by the defaulter, are to be made good by the defaulter.

SCHEDULE Q.

Report on Sale, referred to in Order 387.

IN CHANCERY.

Between A. B.,.....Plaintiff,

and

C. D.,.....Defendant.

Pursuant to the decree (*or order*) of this Honourable Court, bearing date the _____ day of _____, and made in this cause, I have, under the General Orders of this Court, in the presence of (*or, after notice to*) all parties concerned, settled an advertisement and particulars and conditions of sale, for the sale of the lands mentioned or referred to in the said decree (*or order*), and such advertisement having, according to my directions, been published in the (*naming the newspaper or newspapers*), once in each week for the _____ weeks immediately preceding the said sale (*or as the case may be*), and bills of the said sale having been also, as directed by me, published in different parts of the township (*town or city*) of _____ and the adjacent country and villages, (*or as the case may be*), the said lands were offered for sale by public auction, according to my appointment, on the _____ day of _____, by me (*or by Mr. _____ of _____, appointed by me for that purpose, auctioneer,*) and such sale was conducted in a fair, open, and proper manner, when _____, of _____, was declared the highest bidder for, and became the purchaser of the same, at the price or sum of \$ _____, payable as follows (*set out shortly the condition of sale as to payment of the purchase money*).

All which having been proved to my satisfaction by proper and sufficient evidence, I humbly certify to this Honourable Court.

Dated _____.

SCHEDULE R.

Notice, referred to in Order 430.

IN CHANCERY.

(*Short Title*).

To _____, Defendant.

Take notice that the plaintiff elects that the sale of the mortgaged premises be conducted by you instead of by the plaintiff, and you are at liberty to withdraw the deposit made by you in this cause for the purpose of such sale.

SCHEDULE S.

*Endorsement on Office-copy Bill for foreclosure or Sale,
under Order 436.*

Your answer is to be filed at the office of the ——— **[Registrar]*
at ———, in the ——— of ———.

You are to answer or demur within — weeks from the service
hereof.

If you fail to answer or demur within the time above limited, or
if you answer admitting the execution of the mortgage and other
facts stated in the bill as entitling the plaintiff to a decree, you are
to be subject to have a decree or order made against you forthwith
thereafter; and if this notice is served upon you personally, you
will not be entitled to any further notice of the future proceedings
in the cause.

NOTE.—This bill is filed by ———, of ———, in the county
of ———, solicitor for the above named plaintiff.

“And take notice, that the plaintiff claims that there is now due
by you, for principal money and interest, the sum of ———, and
that you are liable to be charged with this sum, with subsequent
interest and costs, in and by the decree to be drawn up; and that
in default of payment thereof within six calendar months from the
time of drawing up the decree, your interest in the property may be
foreclosed (or, sold) unless before the time allowed you as by this
notice for answering, you file in the office above named, a memo-
randum in writing, signed by yourself or your solicitor to the fol-
lowing effect: ——— *dispute the amount claimed by the plaintiff*
in this cause; in which case you will be notified of the time fixed
for settling the amount due by you, at least four days before the
time to be so fixed. (*In case foreclosure is prayed by the plaintiff,*
add;) If you desire a sale of the mortgaged premises instead of a
foreclosure, you must, within the time allowed you to answer, file
in the office above named a note or memorandum in writing, signed
by yourself or your solicitor, to the following effect:—“I desire a
sale of the mortgaged premises in the plaintiff’s bill mentioned, or
a competent part thereof, instead of a foreclosure;” and deposit the
sum of \$80 to meet the expenses of such sale.

* Clerk of Records and Writs see Ord. 550.

SCHEDULE T.

Notice, served under Order 444.

IN CHANCERY.

Between A. B.,.....Plaintiff,
and

C. D.,.....Defendant.

Whereas a suit has been instituted by the above named plaintiff for the foreclosure (*or sale*) of certain lands, being (*insert description of lands*) and I have been directed by the decree made in this cause, and dated the _____ day of _____, to enquire whether any person, other than the plaintiff, has any charge, lien, or incumbrance upon the said estate. And whereas it has been made to appear before me that you have each some lien, charge or incumbrance upon the said estate, and I have therefore caused you each to be made a party to this suit, and appointed the _____ day of _____, at _____ o'clock in the _____ noon, for you to appear before me, at my Chambers at _____, either in person, or by your solicitor, to prove your claims.

Now you are hereby required to take notice : 1st. That if you wish to apply to discharge my order making you a party, or to add to, vary, or set aside the decree, you must do so within fourteen days from the service hereof ; and if you fail to do so, you will be bound by the decree, and the further proceedings in this cause as if you were originally made a party to the suit. 2nd. That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.))

W. L., Master.

To _____

Appointment, served under Order 446.

IN CHANCERY.

Between A. B.,.....Plaintiff,
and

C. D.,.....Defendant.

Having been directed by the decree in this cause, dated the _____ day of _____, to enquire whether any person other than the plain-

tiff has any lien, charge or incumbrance upon the lands in the pleadings mentioned, being, (*insert description of land*), I do hereby appoint the ——— day of ——— next, at ——— o'clock in the ——— noon, at my Chambers at ———, to proceed with the said enquiries.

And you are hereby required to take notice :

That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

W. L., *Master*,

SCHEDULE U.

Notice of Motion for Administration Order, under Order 468.

In the matter of the estate of E. F., late of the Township of Vaughan, in the County of York, deceased.

A. B. against C. D.

To C. D., Executor of E. F., deceased.

Take notice that A. B., of the City of Toronto, in the County of York, Esquire, (*or other proper description of the party*), who claims to be a creditor upon the estate of the above named E. F., will apply to the Court of Chancery, in Chambers, at Osgoode Hall, in the City of Toronto, on the ——— day of ———, at the hour of ———, for an order for the administration of the estate, real and personal, of the said E. F., by the Court of Chancery ; and upon such application will be read the affidavits of (*state the materials upon which the application is founded*) this day filed.

If you do not attend either in person or by your solicitor at the time and place above mentioned, such order will be made in your absence as may seem just and expedient.

Dated, &c.

G. H.,

Of the City of Toronto, Solicitor for the above named A. B.

SCHEDULE V.

No. 1.—*Advertisement for Creditors, under Order 475.*

Pursuant to a decree [or an order] of the Court of Chancery, made in [the matter of the estate of A. B., and in] a cause, S. against P. [short title], the creditors of A. B., late of —, in the county of —, who died in or about the month of —, 18—, are, on or before the — day of —, 18—, to send, by post, prepaid to E. F., of —, the solicitor of the defendant C. D., the executor [or administrator] of the deceased [or as may be directed], their Christian and sur-names, addresses and description, the full particulars of their claims, a statement of their accounts, and the nature of the securities (if any) held by them; or in default thereof, they will be peremptorily excluded from the benefit of the said decree [or order]. Every creditor holding any security is to produce the same before me, at my Chambers, at, &c., on the — day of —, 18—, at — o'clock in the — noon, being the time appointed for adjudication on the claims.

Dated this — day of —, 18—.

G. H., Master.

No. 2.—*Notice to Creditor to produce Documents, under Order 477.*

(Short Title).

You are hereby required to produce, in support of the claim sent in by you, against the estate of A. B., deceased [describe any document required], before me at my Chambers, at, &c., on the — day of —, 18—, at — o'clock in the — noon.

Dated this — day of —, 18—.

G. R., of, &c., Solicitor for the plaintiff,

[or, defendant, or as may be].

To Mr. S. T.

No. 3.—*Affidavit of Executor or Administrator as to
Claims, under Order 480.*

IN CHANCERY.

(Title).

We, C. D., of, &c., the above named plaintiff [or defendant, or as may be], the executors [or administrators], of A. B., late of —, in the County of —, deceased, and E. F., of, &c., solicitor, severally make oath, and say as follows:—

I, the said E. F., [solicitor] for myself, say as follows:

1. I have, in the paper writing now produced and shewn to me, and marked A., set forth a list of all the claims the particulars of which have been sent in to me by persons claiming to be creditors of the said A. B., deceased, pursuant to the advertisement issued in that behalf, dated — day of —, 18—.

And I, the said C. D., for myself, say as follows:

2. I have examined the several claims mentioned in the paper writing now produced and shewn to me, and marked A., and I have compared the same with the books, accounts, and documents of the said A. B., [or as may be, and state any other inquiries or investigations made], in order to ascertain, as far as I am able, to which of such claims the estate of the said A. B., is justly liable.

3. From such examination [and state any other reasons], I am of opinion, and verily believe, that the estate of the said A. B. is justly liable to the amounts set forth in the sixth column of the first part of the said paper writing marked A.; and to the best of my knowledge and belief, such several amounts are justly due from the estate of the said A. B., and proper to be allowed to the respective claimants named in the said schedule.

4. I am of opinion that the estate of the said A. B. is not justly liable to the claims set forth in the second part of the said paper writing marked A., and that the same ought not to be allowed without proof by the respective claimants, [or, I am not able to state whether the estate of the said A. B., is justly liable to the claims set forth in the second part of the said paper writing marked A., or whether such claims, or any parts thereof, are proper to be allowed without further evidence].

Sworn, &c.

Exhibit referred to in Affidavit, No. 3.

(Short Title).

List of claims the particulars of which have been sent in to E. F., the solicitor of the plaintiff, [or, defendant, or as may be], by persons claiming to be creditors of A. B., deceased, pursuant to the advertisement issued in that behalf, dated the — day of — 18 —.

This paper writing, marked A., was produced and shewn to —, and is the same as is referred to in his affidavit, sworn before me this — day of —, 18—,

W. B., &c.

First Part.—Claims proper to be allowed without further evidence.

Serial No.	Names of Claimants.	Addresses and Descriptions.	Nature of Claim.	Amount claimed.		Amount proper to be allowed
				\$.	c.	

Second Part.—Claims which ought to be proved by the Claimants.

Serial No.	Names of Claimants.	Addresses and Descriptions.	Nature of Claim.	Amount claimed.	
				\$	c.

No. 4.—Notice to Creditor that claim allowed, under Order 483.

(Short Title).

The claim sent in by you against the estate of A. B., deceased, has been allowed at the sum of \$——, [with interest thereon at \$—— per cent., per annum, from the —— day of ——, 18——, and \$—— for costs, or as the case may be].

If part only allowed, add.—If you claim to have a larger sum allowed, you are hereby required to prove such further claim, and you are to file [&c., as in Form No. 5.]

Dated this —— day of ——, 18——,

G. R., of, &c., Solicitor for the plaintiff

[or defendant, or as may be.]

To Mr. P. R.

No. 5.—Notice to Creditor to prove his claim, under Order 483.

(Short Title).

You are hereby required to prove the claim sent in by you against the estate of A. B., deceased, You are to file such affidavit as you may be advised in support of your claim, and give notice thereof to ——, Master in Chancery [or as the case may be], on or before the —— day of ——, 18——; and to attend personally or by your solicitor, at his Chambers, on the —— day of ——, 18——, at —— o'clock in the —— noon, being the time appointed for adjudicating on the claim.

Dated this —— day of ——, 18——.

G. R., of, &c., Solicitor for the plaintiff.

[or defendant, or as may be].

To Mr. S. T.

No. 6.—Notice that Cheques may be received, under Order 486.

(Short Title).

The cheques for the amounts directed to be paid to the creditors of A. B., deceased, by an order made in this [matter or] cause dated

the—day of—, 18—, may be received at the Registrar's Office,
in Osgoode Hall, Toronto, on and after the—day of—, 18—.

G. R., of, &c., solicitor for the plaintiff,

[or, defendant, or as may be.]

To Mr. W. S.,
&c.

SCHEDULE W.

Endorsement on Office-copy Order, served under Order 536.

Take notice that unless you within—days after the service
hereof upon you, shew unto the Court of Chancery for Upper
Canada, good cause why the within decree (or order) should not be
binding upon you, you will be bound by the said decree (or order),
and the same will stand and be absolute against you.

Dated, &c., ———.

G. R.,
Solicitor for the plaintiff.

TARIFF.

(Referred to in Order 309.)

Instructions for suit	\$2 00
Instructions to defend	2 00
Instructions for petition where no bill is filed	2 00
Letter of notice before instituting suit	0 50
Drafting bill not exceeding 20 folios, including copy to keep	4 00
For every additional folio above 20, (to be allowed in the dis- cretion of the Master) including copy to keep, per folio.	0 20

[No greater sum than \$6, to be taxed by the Master for drawing any
bill, without the special direction of one of the Judges of the Court, upon
the application of the solicitor requiring the same, for which application
no charge is to be made.]

Drafting answer or other pleading, petition or special affidavit
per folio..... \$0

[No greater sum than \$6, to be taxed for drawing any answer, petition, or affidavit, without the special direction of one of the Judges of the Court, as provided for in the case of bills; and no greater sum is to be allowed for drawing an answer, petition, or affidavit, than would have been taxed irrespective of this order.]

Engrossed copies to file, copies to serve (other than copies on which a fee is to be paid to the Master, Clerk of Records and Writs, or Deputy Registrar, for reading over or authenticating the same), per folio.....	\$0 10
Copies of orders or other papers or documents, required to be served, per folio	0 10
Office-copies authenticated by the Clerk of Records and Writs, or Deputy Registrar, per folio	0 08
Affidavits of service of bill, including attendance to swear	1 00
Affidavits of service, including attendance to swear	0 40
Precipe for any process, including attendance	0 50
Special attendance on Master's warrant or appointment, or on examination of witnesses, or on hearing of cause or demurrer or special motion.....	\$1 00

[No such fee or any other costs of, and incidental to an appointment is or are, to be allowed by the Master to any party, either by consent or on any ground whatever, as part of the costs of the cause, when the appointment was adjourned without being proceeded on, or where no substantial progress with the reference was made thereon. But the Master may order the payment of such costs as provided for by Order 213.]

When the hearing shall exceed one hour, then for every additional hour which shall be occupied by such hearing, and at which the solicitor shall be present in Court, provided the same be noted in the Registrar's book, or be proved by affidavit (such affidavit to be without charge,) the same not to exceed \$4.....	\$1 00
For every additional hour beyond one hour in the Master's Office	1 00

[For attendance in the Master's office upon a warrant or appointment to hear and determine, the Master may increase the fee for such attendance to any sum not exceeding two dollars per hour, where, in the judgment of the Master, the matters to be heard and determined are of such special nature as to have required previous preparation, and where the Master finds that previous preparation has been bestowed thereupon, and that in his judgment such increase of fee is reasonable and proper under the circumstances; but no such allowance is to be made for more than one day

unless the hearing is proceeded with *de die in diem* to the conclusion thereof; or unless such proceedings be prevented by a party other than the one claiming the increased allowance; and the increased allowance is not to be made unless the same is noted at the time in the Master's book.]

For every additional hour in the examination of witnesses
where no counsel employed \$1 00

[The fee on the attendance of a solicitor, where the solicitor attends in person, and no counsel is employed, may in special cases be increased in the discretion of the Judge, or Officer before whom the examination is had, to two dollars, and where the examination occupies more than one hour, then two dollars for every additional hour which is so occupied, and during which the solicitor is present in attendance thereupon, provided the same is noted at the time in the Registrar's book, or in the book of the Master, or other Officer, as the case may be.]

Attending consultations of counsel, per hour..... \$1 00

[No special attendance to be allowed to a solicitor on proceedings upon which he appears also as counsel.]

Appointment to settle minutes, or to pass decree or order,
copy and service \$0 80

For every hour's attendance before the Registrar by his
appointment, on settling minutes, the same being noted
by the Registrar 1 00

For every hour's attendance before the Registrar by his
appointment, on passing decree or special order, the
same being noted by the Registrar 1 00

[The fee on settling minutes and on passing Decrees or Orders may be increased in the discretion of the Registrar, in special cases, to two dollars, where the solicitor attends personally on such settling or passing.]

Where minutes settled, or decrees or special order approved
of or passed between the Solicitors after appointment
issue by the Registrar \$1 00

[In such case no fee to be allowed to either party as for attendance before the Registrar in respect of the same settling or passing.]

Fee on all writs and orders of Court to the party obtaining
the same..... \$1 0

Instructions for brief 1 00

Brief, per folio, including briefing and fair copy, subject to
be reduced by the Master, if the same contain super-
fluous matter, or be of unnecessary length..... 0 10

Observations or other original matter in brief, per folio 0 20

[A brief of depositions or special affidavits to be allowed only where fee and brief for second counsel is taxed.]

Drawing special minutes, when prepared by the solicitor,
per folio..... \$0 20

Advertisements for sale of real or personal estate, under the
direction of the Court, including all copies, except for
printing 1 00

Copies for printing—per folio 0 10

Fee on conducting sale—including arrangements with
auctioneer, correcting proof-sheets (if any) and at-
tending sale 5 00

For every hour beyond three occupied at such sale 1 00

Drawing bill of costs and attending taxation 1 00

Drawing Judge's appointment, and attending for his signa-
ture, and to serve..... 1 00

Every necessary attendance 0 50

Necessary agency letters in the course of a cause or matter,
to be allowed on taxation between party and party, as
attendances

Postages—the amount actually disbursed.

[The sum allowed for copying and briefing shall be ten cents per folio, except where authenticated by the Clerk of Records and Writs, or read over by the Master; but the same shall not in any case exceed one half of the amount allowed for drawing what shall be so copied or briefed.]

COUNSEL

On argument in Chamber in cases proper for the attendance
of counsel, to be increased at the discretion of the
Judge \$2 00

On settling and signing pleadings and petitions respectively,
where from their special nature the Master shall think
the pleading or petition a proper one to be settled by
counsel 2 00

On consultations 5 00

On special applications to the Court, arguing demurrer or
other special argument, or at the hearing of a cause..... 10 00

[To be increased, in the discretion of the Master, to a sum not exceed-
ing \$40 to senior counsel, and \$20 to junior counsel, in suits of a special
and important nature; but more than one counsel fee is not to be allowed
in any case not of a special and important nature. Where two counsel

fees or an increased fee is allowed by a Local Matter, he is to forward to the Taxing Officer with the bill, upon transmitting it for revision, such information as may enable the Taxing Officer to judge of the propriety of the fee or fees allowed.]

MASTER.

Every summons or warrant.....	\$0 30
Administering oath, or taking affirmation.....	0 20
Marking every exhibit.....	0 20
Drawing depositions, reports or orders, per folio	0 20
One fair copy when necessary, per folio.....	0 10
Copy of papers given out when required, per folio.....	0 10
Every attendance upon a reference.....	1 00
For each additional hour.....	1 00
Every certificate	0 50
Filing each paper.....	0 10
Taxing costs, including attendance.....	1 00
Making up and forwarding answers and depositions.....	0 30
Every special attendance out of office, within two miles.....	1 00
Every additional mile above two	0 20
Reading affidavit—per folio	0 02
Matter added—per folio.....	0 20
Searching files in office	0 20

REGISTRAR.

Drawing minutes of decree or special order—per folio	0 20
Drawing decree or order—per folio	0 20
Entering same—per folio.....	0 10
Fee on payment of money into Court.....	0 30
Fee on payment of money out of Court.....	0 30
Fee on admission of Solicitor.....	1 00
Commission appointing Local Master or, Deputy Registrar...	2 00
Attendance on appointment of guardian.....	0 50

JUDGES' SECRETARY.

On every application in Chambers (including the order thereon, if made), for a decree against infants, for the administration of an estate, for the sale of an infant's estate, to declare a person a lunatic, for interim alimony, for a vesting order, for final order of foreclosure or sale, for foreclosure after abortive sale, to extend time for payment of mortgage money, or for taxation	1 00
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On every other application (including the order thereon, if made).....	0 50
For other services, the like fees as are payable to the Master.	

SPECIAL EXAMINERS.

Every summons or warrant.....	\$0 30
Administering oath, or taking affirmation	0 20
Marking each exhibit	0 20
Drawing depositions—per folio	0 20
Copy for Solicitor, when required—per folio	0 10
Every attendance out of office, when within two miles.....	1 00
Every attendance out of office above two miles, extra per mile.....	0 20
Every certificate	0 50
Making up and forwarding answers and depositions	0 30
Every attendance upon an appointment, when Solicitor or witnesses do not attend, and Examiner not notified.....	1 00

CLERK OF RECORDS AND WRITS, AND DEPUTY REGISTRAR.

Entering parties' names, and filing bill, answer or demurrer.	\$0 50
Entering and filing all other pleadings, interrogatories and depositions, or other evidence.....	0 20
Filing and registering affidavits, exhibits, or other papers...	0 10
Entering note <i>pro confesso</i>	0 50
Subpoena, including filing preceps.....	0 50
Special writ, writ of commission	1 00
Office-copy of papers required to be given out—per folio.....	0 10
Examining and authenticating same, when office-copy prepared by Solicitor—every three folios.....	0 05
Amendment of record, when re-engrossment not necessary—per folio	0 20
Making up, and forwarding interrogatories.....	0 30
Setting down cause, other than for hearing <i>pro confesso</i>	2 00
[The fee payable to a Deputy Registrar on setting down a cause for hearing to be \$8.]	
Setting down cause <i>pro confesso</i>	\$0 50
Certificate of pleadings being filed.....	0 40
Certificate of state of cause.....	0 50
Searching files in office	0 20

SHERIFFS.

Receiving, filing, entering and endorsing every paper	\$0 25
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APPENDIX.

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Return of all process and writs except subpoenas	0 50
Warrant to bailiff, on writ not executed by Sheriff or Deputy	0 50
Serving each office-copy bill including affidavit of service...	1 00
Serving each warrant, notice, certificate, subpoena, or other paper	0 50
Writ of Arrest—arrest on, when amount endorsed under \$200	1 00
\$200, and under \$400.....	2 00
\$400, and over.....	4 00
Attachment—arrest on	2 00
Sequestration—upon seizure of estate and effects under writ of sequestration.....	2 00
Schedule of goods taken in execution, including copy for defendant, if not exceeding 5 folios	1 00
Each folio above 5.....	0 10
Removing or retaining property, reasonable and necessary disbursements, and allowances to be made by the Master or by order of the Court or Judge.	
Poundage upon sequestration, followed by sale.	
Where amount made under \$400, at.....	5 per cent.
\$400, but under \$4,000, 5 per cent. for the first \$400	
2½ per cent for the residue. \$4,000 and over, 1½ per cent. on whatever exceeds \$4,000, in addition to the poundage allowed up to \$4,000, in lieu of all fees and charges for services and disbursements, except mileage in going to seize, and disbursements necessarily incurred in the care and removal of property to be allowed by the Master in his discretion	
For services not specified—The like charges as are allowed at Common Law for analogous services.	

AN ACT RESPECTING THE COURT OF ERROR AND APPEAL.

CONSOLIDATED STATUTES OF UPPER CANADA, CAP. XIII.

Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

I. The "Court of Error and Appeal," at present existing in Upper Canada, is hereby continued, and shall be called the Court of Error and Appeal. 12 V., c. 63, s. 38.

II. The Judges for the time being of the Courts of Queen's Bench, Chancery, and Common Pleas in Upper Canada, shall be *ex officio*, members of the Court of Appeal. 20 V., c. 5, s. 2.

III. The Governor may, by commission under the Great Seal from time to time, appoint any retired Judge of any of the said Superior Courts as an additional Judge of the Court of Error and Appeal. 20 V., c. 5, s. 2.

IV. Every person so appointed shall take such rank and precedence, after the Chief Justice of Upper Canada, the Chancellor of Upper Canada, and the Chief Justice of the Court of Common Pleas as may be designated in his commission. 20 V., c. 5, s. 2.

[V. Repealed by 24 Vic., c. 36.]

By 24 Vic. c. 36, the following is substituted for section 5. "The Governor may, by commission under the Great Seal, from time to time, appoint any retired Judge of any of the Superior Courts of Upper Canada, to be the presiding Judge of the said Court of Error and Appeal, and failing such appointment, the Chief Justice of the Court of Queen's Bench for the time being, and in his absence the Judge entitled to precedence over all the other Judges present shall preside.

By 25 Vic., c. 18, sec. 1, the presiding Judge so appointed is to have rank and precedence over all the other Judges of Her Majesty's Courts of Law and Equity in Upper Canada.

By sec. 2, he is, within six months after his appointment, to take the prescribed oath before the Governor in Council.

By sec. 3, he is entitled if enjoying a pension for an annuity of two-thirds of the salary annexed to the office from which he retired, to receive in addition a sum equal to one-third of the amount of his salary at the time of his retirement.]

VI. Seven members of the Court shall be necessary to constitute a quorum. 20 V., c. 5, s. 4.

VII. The Registrar of the Court of Chancery shall *ex officio* be Clerk of the Court of Error and Appeal. 12 V., c. 63, s. 43.

[VIII. Repealed by 25 Vic., c. 18, s. 4.

By 25 Vic., c. 18, s. 4, the following is substituted for section 8. The Court of Error and Appeal shall hold its sittings at the City of Toronto, on the fourth Thursday next after the several terms of Hilary, Easter, and Michaelmas, and may adjourn from time to time, and meet again at the time fixed on the adjournment, for the transaction of business.]

IX. The Court shall have an appellate Civil and Criminal Jurisdiction throughout Upper Canada, and an appeal shall lie thereto from all judgments of the Courts of Queen's Bench and Common Pleas, and from all judgments, orders and decrees of the Court of Chancery. 12 V., c. 63, s. 40.

X. The Court shall have power to quash proceedings in cases brought before it, in which Error or Appeal does not lie, or where such proceedings are taken against good faith, or in which proceedings might heretofore have been quashed in the Court, according to the law and practice in England. 20 V., c. 5, s. 6.

XI. The Court shall have power to dismiss an Appeal, or to give the Judgment or Decree and to award the process or other proceedings which the Court whose decision is appealed against ought to have given, without regard to the party alleging Error, and may also award restitution and payment of costs. 20 V., c. 5, s. 7.

XII. The Judgment, Decree or award shall be certified by the Clerk of the Court of Error and Appeal to the proper officer of the Court below, who shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon, as if the Judgment, Decree or Award had been given in the Court below. 20 V., c. 5, s. 7.

XIII. An appellant may discontinue his proceedings by giving to the respondent a notice headed in the Court and cause, and signed by the appellant or his Attorney, stating that he discontinues such proceedings; and thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in Appeal, and may either sign judgment for such costs or obtain an Order for their pay-

ment in the Court below, and may take all further proceedings in that Court, as if no appeal had been brought. 20 V., c. 5, s. 8.

XIV. A respondent may consent to the reversal of the judgment, decree or proceeding appealed against, by giving to the appellant a notice headed in the Court and cause, and signed by the respondent or his Attorney, stating that he consents to the reversal of the judgment, decree or other proceeding, and thereupon the Court shall pronounce judgment of reversal as of course. 20 V., c. 5, s. 9.

XV. No appeal shall be allowed until the appellant has given proper security to the extent of four hundred dollars, to the satisfaction of the Court from whose order, decree or judgment he is about to appeal, that he will effectually prosecute his appeal, and pay such costs and damages as may be awarded in case the judgment or decree appealed from be affirmed. 12 V., c. 63, s. 40. *The Proviso and see Post, ss. 17, 35, 59, & 60.*

XVI. Upon the perfecting of such security, execution shall be stayed in the original cause, except in the following cases: 12 V., c. 63, s. 40.

1. If the judgment or decree appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment or decree shall not be stayed until the things directed to be assigned or delivered are brought into Court or placed in the custody of such Officer or receiver, as the Court appoints, nor until security has been given to the satisfaction of the Court appealed from, and in such sum as that Court directs, that the appellant will obey the Order of the Appellate Court; 12 V., c. 63, s. 40, No. 2.

2. If the judgment or decree appealed from directs the execution of a conveyance or any other instrument, the execution of the judgment or decree shall not be stayed until the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the judgment of the Appellate Court; 12 V., c. 63, s. 40, No. 3.

3. If the judgment or decree appealed from directs the sale or delivery of possession of real property or chattels real, the execution of the judgment or decree shall not be stayed until security has been entered into to the satisfaction of the Court appealed from, and in such sum as that Court directs, that during the possession of the property by the Appellant, he will not commit or suffer to be committed any waste on the property, and that if the judgment be affirmed, he will pay the value of the use and occupation of the prop-

erty from the time of the appeal until the delivery of possession thereof, and also, in case the judgment or decree is for the sale of property and the payment of a deficiency arising upon the sale, that the Appellant will pay the deficiency; 12 V., c. 63, s. 40, Nos. 4 and 5.

4. If the judgment, order or decree appealed from directs the payment of money, the execution of the judgment or decree shall not be stayed until the appellant has given security, to the satisfaction of the Court appealed from, that if the judgment, order or decree, or any part thereof, be affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed if it be affirmed only as to part, and all damages awarded against the appellant on the appeal. 12 V., c. 63, s. 40, No. 1.

XVII. When the security has been perfected and allowed, any Judge of the Court appealed from may issue his *fiat* to the Sheriff to whom any execution on the judgment or decree has issued, to stay the execution, and the execution shall be thereby stayed whether a levy has been made under it or not. 18 V., c. 123, s. 1.

XVIII. If at the time of the receipt by the Sheriff of the *fiat*, or of a copy thereof, the money has been made or received by him but not paid over to the party who issued the execution, the party appealing may demand back from the Sheriff the amount made or received under the execution, or so much thereof as is in his hands not paid over, and in default of payment by the Sheriff upon such demand, the appellant may recover the same from him in an action for money had and received. 18 V., c. 123, s. 2.

XIX. The death of the appellant after the security has been perfected and allowed shall not cause the appeal to abate. 20 V., c. 5, s. 10.

XX. The death of the respondent shall not cause the appeal to abate. 20 V., c. 5, s. 11.

XXI. The marriage of a woman appellant or respondent shall not abate the appeal, but the proceedings in error and appeal shall go on as if no such marriage had taken place, and the decision of the Court shall be certified as in other cases. 20 V., c. 5, s. 12.

XXII. An appeal shall lie from a judgment upon a special case in the same manner as from a judgment upon a special verdict, unless the parties agree to the contrary; and the proceedings for bringing

a special case before the Court of Error and Appeal shall, as nearly as possible, be the same as in the case of a special verdict, and that Court shall draw any inferences of fact from the facts stated in the special case; which the Court by which the case was originally decided ought to have drawn. 20 V., c. 5, s. 13.

XXIII. An appeal shall lie in the case of a rule to enter a verdict or non-suit upon a point reserved at the trial whether a rule to shew cause has been refused or granted, or has been discharged or made absolute. 20 V., c. 5, s. 14.

XXIV. In all cases of motion for a new trial upon the ground that the Judge has not ruled according to law, if the rule to shew cause be refused, or if granted, be afterwards discharged or made absolute, the party decided against may appeal, provided any one of the Judges dissent from the rule being refused, or when granted, being discharged or made absolute, as the case may be, or provided the Court in its discretion think fit that an appeal should be allowed. 20 V., c. 5, s. 15.

XXV. No appeal shall be allowed under the three preceding sections, unless notice thereof be given in writing to the opposite party or his attorney and to the Clerk of the Crown of the proper Court, within fourteen days after the decision complained of, or within such further time as the Court appealed from, or a Judge may allow. 20 V., c. 5, s. 16.

XXVI. Where the application for a new trial is upon matter of discretion only, as on the ground that the verdict is against the weight of evidence, or otherwise, no appeal shall be allowed. 20 V., c. 5, s. 15.

XXVII. An appeal shall lie in ejectment in the same manner and to the same extent as in any other case. 20 V., c. 5, s. 17.

XXVIII. An appeal shall lie in all cases in which a By-law of a Municipal Corporation has been quashed by rule of Court after argument. 20 V., c. 5, s. 18.

XXIX. A person convicted of treason, felony, or misdemeanor, before any Court of Oyer and Terminer or Gaol Delivery, whose conviction has been affirmed by either of the Superior Courts of Common Law, may appeal against the affirmation, and the Court of Error and Appeal shall make such rule or order therein, either in affirmance of the conviction or for granting a new trial, or other-

wise, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect ; but no such appeal shall be made unless allowed by the Superior Court appealed from, or by two of the Judges thereof, in term or vacation ; nor unless such allowance has been granted and the appeal been heard, within six months after the conviction was affirmed, unless otherwise ordered by the Court of Error and Appeal ; and any rule or order of the Court of Error and Appeal shall be final. 20 V., c. 61, s. 4.

XXX. No other appeal from a decision of the Court of Queen's Bench or Common Pleas shall be allowed, unless the judgment, decision, or other matter appealed against, appears of record. 20 V., c. 5, s. 19.

XXXI. In cases not otherwise provided for, an appeal against any judgment or decision shall be commenced and prosecuted with effect within four years after the judgment or decision has been entered of record, given or completed, unless with respect to any person entitled to appeal, and who is, at the time such title accrues, within the age of twenty-one years, *feme covert*, *non compos mentis*, or without the limits of this Province, and then such person shall have for commencing his appeal and prosecuting the same with effect, six years after becoming of full age, *discover*, of sound memory, or returning to the Province ; and if the opposite party, at the time the title to appeal accrues, be out of the Province, then the party desirous of appealing shall have for commencing his appeal and prosecuting the same with effect, six years after the return of such party to this Province. 19 V., c. 43, ss. 293, 294.

XXXII. A Writ of Error and Appeal shall not be used in any civil case, and the proceeding to appeal against a judgment shall be a step in the cause. 20 V., c. 5, s. 20.

XXXIII. Either party alleging error in law may deliver to the Clerk of the Crown of the Court wherein the suit was instituted, a memorandum in writing, entitled in the Court and cause, and signed by the party or his Attorney, alleging that there is error in law in the record and proceedings. 20 V., c. 5, s. 21.

XXXIV. The Clerk shall file the memorandum, and deliver to the party lodging the same a note of the receipt thereof, and the latter shall serve on the opposite party, or his attorney, a copy of the note, together with a statement of the grounds of error intended to be argued.

The memorandum may be to the effect following :

"In the (Q. B. or C. P.)

"The day of , in the year of our Lord, 18

(The day of lodging Note of Error.)

"A. B. and C. D.

"The plaintiff (or defendant) says that there is error in law in
"the record and proceedings in this action, and the defendant (or
"plaintiff) says that there is no error therein.

"A. B., Plaintiff,

"(or C. D., Defendant,)

"(or E. F., Attorney for Plaintiff or Defendant) ;"

20 V., c. 5, Sch. A 1.

XXXV. Proceedings in an appeal from a decision in a Court of Law shall be deemed a supersedeas of execution from the time of the allowance of the security ; but if the grounds of error or appeal appear to be frivolous, the Court whose judgment is appealed from, or a Judge upon summons, may order execution to issue or to be proceeded with. 20 V., c. 5, s. 22.

XXXVI. The assignment of, and joinder in error in law shall not be used, and instead thereof a suggestion to the effect that error is alleged by the one party and denied by the other, may be entered on the judgment-roll. 20 V., c. 5, s. 23.

XXXVII. The suggestion shall be to the effect following :

"The day of , in the year of our Lord, 18 .

(The day of making the entry on the Roll.)

"The plaintiff (or defendant) says that there is error in the above
"record and proceedings, and the defendant (or plaintiff) says
"there is no error therein." 20 V., c. 5, Sch. A. 2.

XXXVIII. In case the respondent intends to rely upon the proceeding in error being barred by lapse of time or by release of error or other matter of fact, he shall give four days' notice in writing to the appellant, to file and serve a copy of his grounds of error and appeal instead of entering the suggestion, and the respondent shall within eight days plead thereto the bar by lapse of time, or release of error or other matter of fact, and thereupon further proceedings may be had according to the law and practice in England. 20 V., c. 5, s. 23.

XXXIX. The roll shall be made up, and the suggestion entered by the appellant, within ten days after the service of the note of the receipt of the memorandum alleging error, or within such other time as the Court appealed from or a Judge orders; and in default thereof or of an assignment of error in a case where an assignment is required, the respondent, his executors or administrators, may sign judgment of *non pros*. 20 V., c. 5, s. 24.

XL. In case of an appeal on a judgment against several persons in which some only appeal, the memorandum alleging error and the note of the receipt of such memorandum shall state the names of the persons who appeal, and in case the other persons against whom judgment has been given decline to join in the appeal, the same may be continued and the suggestion entered, stating the persons who appeal, without a summons and severance, or if such other parties afterwards elect to join, then the suggestion shall state them to be, and they shall be deemed appellants although not mentioned as such in previous proceedings. 20 V., c. 5, s. 25.

XLI. Upon such suggestion being entered, and after the security required to be given by the appellant has been duly allowed, the Clerk of the Court appealed from shall, on payment of his fees, prepare a full transcript of the judgment appealed against, and certify the same under the seal of the Court, and shall forthwith transmit the same to the Clerk of the Court of Error and Appeal, and the cause may then be set down for argument in that Court. 20 V., c. 5, s. 26.

XLII. In case of an appeal upon a motion or rule for a new trial, or to enter a verdict or non-suit, or upon a rule whereby a By-law has been quashed, the appeal shall be upon a case to be stated by the parties, or in the event of difference to be settled by the Court or a Judge of the Court appealed from. 20 V., c. 5, s. 27.

XLIII. The case shall set forth so much of the pleadings, evidence, affidavits, documents, and the ruling or judgment objected to, as may be necessary to raise the question for the decision of the Court of Error and Appeal. 20 V., c. 5, s. 27.

XLIV. When the case has been so stated and settled, the same shall be forthwith delivered by the Appellant to the Clerk of the Court of Error and Appeal, and the cause may, after the security required to be given by the appellant has been duly allowed, be set down for argument. 20 V., c. 5, s. 27.

XLV. The appellant shall, at least four clear days before the day appointed for hearing the argument, deliver to the Clerk a copy for each of the Judges, of the transcript of the Judgment or Case, or in default, the appeal may be dismissed with costs. 20 V., c. 5, s. 28.

XLVI. In case of the death of one of several appellants, a suggestion may be made of his death, and the proceedings may thereupon be continued at the suit of and against the surviving appellant, as if he were the sole appellant; and such suggestion shall not be traversable, but if untrue may be set aside on motion. 20 V., c. 5, s. 29.

XLVII. In case of the death of a sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appellant may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, and the proceedings may thereupon be continued at the suit of and against such legal representative as the appellant, and if no such suggestion be made, the respondent may proceed to an affirmance of the Judgment according to the practice of the Court, or take such other proceedings as he may be entitled to: and such suggestion, if made, shall not be traversable, but if untrue may be set aside on motion. 20 V., c. 5, s. 30.

XLVIII. In case of the death of one of several respondents, a suggestion may be made of such death, and the proceedings may be continued against the surviving respondent; and such suggestion shall not be traversable; but if untrue may be set aside on motion. 20 V., c. 5, s. 31.

XLIX. In case of the death of a sole respondent or of all the respondents, the appellant may proceed upon giving one month's notice of the appeal, and of his intention to continue the same to the representative of the deceased, or if no such notice can be given, then upon giving the notice to the parties interested as the Court or a Judge may direct. 20 V., c. 5, s. 32.

L. When on an appeal against a Judgment in any action personal, the Court of Error and Appeal gives Judgment for the Defendant in error, interest shall be allowed by the Court for such time as execution has been delayed by the appeal. 7 W. 4, c. 3, s. 22.

LI. If a woman, being an appellant or respondent, marries pending the appeal, and Judgment be given for her, execution may

thereupon be issued in the Court below, by the authority of the husband, without any suggestion or Writ of Revivor, and if judgment be given against her, such judgment may be executed in the wife alone, or by suggestion or Writ of Revivor pursuant to the *Common Law Procedure Act*, judgment may be obtained against the husband and wife, and execution issued thereon. 20 V., c. 5, s. 33.

LII. A party desirous of appealing from any Decree or Order in Chancery, shall file a petition of appeal with the Clerk of the Court of Error and Appeal, and shall serve a copy thereof, together with a notice of the hearing of the appeal, on the respondent, his Solicitor or Agent, at least two months before the time mentioned in such notice for the hearing of the appeal. 20 V., c. 5, s. 34.

LIII. Such petition shall not be answered, but proceedings shall go on as if the petition had been answered and as if the time named in the notice had been appointed by the Court for hearing the appeal.

LIV. The petition shall be in the following form :

“ IN THE COURT OF ERROR AND APPEAL.

“ Between A, B., Appellant, and C. D., Respondent:

“ To the Honorable the Judges of the said Court.

“ The petition of the said A. B., sheweth ;

“ That a Decree (or Order) was on _____ pronounced by Her
“ Majesty's Court of Chancery for Upper Canada, in a certain cause
“ depending in the said Court, wherein your petitioner was plaintiff
“ (or defendant) and [the above named C. D. was defendant (or
“ plaintiff), which said Decree (or Order) has been duly entered
“ and enrolled./

“ That your petitioner hereby appeals from the said Decree (or
“ Order), and prays that the same may be reversed or varied,
“ or that such other Decree (or Order) in the premises may be made
“ as to your Honorable Court seems meet.

“ And your petitioner will ever pray, &c.”

(Certificate of Counsel to be added.)

20 V. c. 5, Sch. A. 3.

LV. In case of an appeal from the Court of Chancery, the appellant shall bring the same to a hearing if the appeal is from a Decree or Decretal Order, within one year from the pronouncing thereof; and if the appeal is from an Interlocutory Order, not being a Decretal Order, then within six months from the pronouncing the same, or within such further time in either case as may be allowed for the purpose by the Court of Error and Appeal, or by the Court of Chancery or a Judge thereof, upon special grounds shewn to the satisfaction of the Court or Judge granting the same. 20 V., c. 5, s. 35.

LVI. As to a Decree or Order which, under any General Orders of the Court of Chancery, does not become absolute upon the same being pronounced, the time limited for appealing therefrom shall be computed from the time when the same does become absolute. 20 V., c. 5, s. 35.

LVII. The judgment of the Court of Error and Appeal shall be final where the matter in controversy does not exceed the sum or value of four thousand dollars. 20 V., c. 63, s. 46.

LVIII. In a case exceeding that amount, as well as in a case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an Appeal shall lie to Her Majesty in Her Privy Council. 12 V., c. 63, s. 46.

LIX. But no such Appeal shall be allowed until the appellant has given security in two thousand dollars, to the satisfaction of the Court appealed from, that he will effectually prosecute the appeal, and pay such costs and damages as may be awarded in case the Judgment or Decree appealed from be affirmed. 12 V., c. 63, s. 46.

LX. Upon the perfecting of such security, execution will be stayed in the original cause. 12 V., c. 63, s. 64, and *see ante* ss. 16, 17, 35.

LXI. But the provision of the sixteenth section of this Act shall apply to such Appeal, and the completion of the security hereby required shall not have the effect of staying execution in the cause, in

the different cases to which the said section relates, unless the provisions in the said section be complied with. 12 V., c. 63, s. 46.

LXII. Every Judge of the Court of Error and Appeal shall have authority to approve of and allow the security to be given by a party who intends to appeal to Her Majesty in Her Privy Council, whether the application for such allowance be made during the sitting of the said Court, or at any other time. 20 V., c. 5, s. 36.

LXIII. Costs awarded by Her Majesty in Her Privy Council, upon an appeal, shall be recoverable by the same process as costs awarded by the Court of Error and Appeal. 20 V., c. 5, s. 37.

LXIV. The Judges of the Court of Error and Appeal, or any five or more of them, of whom the Chief Justice of Upper Canada and the Chancellor shall be two, may from time to time make such general rules and orders for the effectual execution of this Act, and of the intention and object hereof, and for fixing the costs to be allowed in respect of proceedings in the Court, and for regulating the different proceedings in appeal, as to them may seem expedient; and may also from time to time alter and amend any of the existing rules, or any rules made under the authority of this Act, and make other rules instead thereof; and until such rules be made, the present rules and existing practice and mode of proceeding in the Court shall continue in force. 20 V., c. 5, s. 38.

LXV. The Clerk of the Court of Appeal shall not take for his own use or benefit, directly or indirectly, any fee or emolument whatever except the salary to which he is entitled as Registrar of the Court of Chancery, and all fees, received by or on account of the Registrar, as Clerk of the Court of Appeal, shall form part of the Consolidated Revenue Fund of the Province. 12 V., c. 63, s. 43.

LXVI. The Clerk of the Court of Error and Appeal shall, on the first day of January, April, July and October in every year, render to the Minister of Finance, a true Account in writing, of all the fees received by or on account of the office of Clerk, in such form and with such particulars as the Minister of Finance from time to time requires; and such Accounts shall be signed by the Clerk, and the correctness thereof shall be by him declared before one of the Judges of the Court; and the Clerk shall, within ten days after the rendering of the Account, pay over the amount of the fees to the Receiver General, and in case of default, the amount due by the Clerk shall be deemed a special debt to Her Majesty. 12 V., c. 63, s. 44.

ORDERS OF THE COURT OF ERROR AND APPEAL.

3RD JULY, 1850.

1. That the first process in appeal from judgments of the Court of Queen's Bench or Common Pleas, shall be by a writ of appeal, which may be in the following form :—

UPPER CANADA.

[L. S.] Victoria, &c,

To the Honourable—Chief Justice of the Court of —, greeting :

Whereas, in the record and proceedings, and also in the giving of Judgment in a certain suit in our Court of our Bench for Upper Canada (or in the Court of Common Pleas) between A. B. and C. D., in a plea of trespass on the case (or as the case may be) as it is said manifest error hath intervened, as by the said (appellant) we are informed : we therefore, being willing that the error, if any there be, should, according to the laws of Upper Canada, be duly corrected, do command you that without delay you send under the seal of the said Court the record and proceedings aforesaid, with all things concerning the same, to our Court of Error and Appeal, that the said Court of Error and Appeal (the record and proceedings aforesaid being seen and examined) may further cause to be done thereupon what of right and according to the laws aforesaid ought to be done.

Witness the Honourable—, Chief Justice, &c.

2. That such writ may issue in all cases where by law an appeal lies to this Court from the Judgment of either of the Courts of Queen's Bench or Common Pleas, upon security being perfected as required by the statute in that behalf, and upon a certificate thereof signed by the chief clerk of the Court appealed from, together with a *præcipe* for such writ being filed with the clerk of this Court ; such writ to be issued under the seal of this Court and signed by the clerk thereof, and to be tested in the name of the Chief Justice or senior Judge thereof for the time being on the day of the same issuing, and to be made returnable on the fifteenth day after the day on which the same shall issue.

3. That, unless otherwise specially ordered, such security shall be personal and by bond, and may be in the form prescribed in rule number five, and shall be filed in the principal office of the Court appealed from.

APPEAL.

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4. That the security for costs required by the statute 12 Vic., c. 63, sec. 40, shall be given by bond to the respondent or respondents in the sum of one hundred pounds, being the sum named in the statute, which bond shall be executed by the appellant or appellants, or one of them, and by two sufficient securities, (or if the appellant or appellants be absent from or do not reside in Upper Canada, then by three sufficient securities,) and the conditions thereof shall be to the effect that the appellant or appellants shall and will effectually prosecute his or their appeal, and pay such costs or damages as shall be awarded in case the judgment appealed from shall be affirmed or in part affirmed. The bond and conditions may be in the form given by rule number five.

5. That the bond for securing costs shall be in the following form :

Know all men by these presents that we A. B. of —, C. D. of —, and E. F. of —, are jointly and severally held and bound unto G. H. of — in the penal sum of — lawful money of Canada, for which payment well and truly to be made we bind ourselves and each of us by himself, our, and each of our heirs, executors, and administrators respectively, firmly by these presents. Witness our hands and seals respectively, the — day of —, in the year of our Lord —.

Whereas the (appellant) alleges and complains that in the giving of Judgment in a certain suit in her Majesty's Court of Queen's Bench, (or the Court of Common Pleas, as the case may be) in Upper Canada, between (the defendant) and (the appellant) in a plea of —, manifest error hath intervened, wherefore the said (appellant) desires to appeal from the said judgment to the Court of Error and Appeal.

Now the condition of this obligation is such, that if the said (appellant) do and shall effectually prosecute such appeal and pay such costs and damages as shall be awarded in case the judgment aforesaid to be appealed from shall be affirmed, then this obligation shall be void, otherwise shall remain in full force.

6. That when the judgment to be appealed from directs the payment of money, and the appellant desires to stay the execution thereof, then the bond or security aforesaid shall be double the amount of such judgment, unless the same shall be in debt or bond for a penal sum or upon a warrant of attorney or *Cognovit Actionem*

or otherwise, exceeding in amount the sum really due, in which case the bond shall be in double the true or real debt and costs only; and the amount so recovered, and of such true and real debt and costs shall be stated in the condition or recital to the condition of the bond or security, immediately after the statement of the nature of the action, and the condition shall be to the effect that the said (appellant) shall effectually prosecute such appeal, and if the said judgment so to be appealed from or any part thereof shall be affirmed, shall pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed (if it be affirmed only in part) and all damages which shall be awarded against the said appellant in the appeal: provided always, that in cases where the security to be given shall be in a sum above five hundred pounds, it shall be in the discretion of the Court appealed from, or of a Judge thereof in vacation, to allow security to be given by a large number of obligors, apportioning the amount among them as shall appear reasonable.

7. That when the judgment appealed from shall be in an action of ejectment, the security required by the last preceding rule shall be taken in double the yearly value of the property in question; and in cases where the matter in question shall relate to the taking of any annual or other rent, customary or other duty or fee, or any other such like demand of a general and public nature, affecting future rights, the amount in which security shall be taken in addition to the security required for costs shall be fixed by order of a Judge of the Court appealed from.

8. That the security required by the two last preceding rules shall be given by bond, and the recitals and conditions of such bond shall be such as will conform to the provisions of the said two rules, with such further or other conditions, in cases where the judgment is not for the payment of a sum of money only, as the Judge approving such security may think fit to order.

9. That the parties to such bond, as sureties, shall by affidavit respectively, make oath that they are resident householders or freeholders in Upper Canada, and severally worth the sum mentioned in such bond, over and above what will pay and satisfy all their debts; which affidavit may be in the following form:—

In the (style of Court.)

A. B., plaintiff,	}	E. F. of —, and G. H. of —, severally
v.	}	make oath and say: and first this deponent
C. D., defendant.	}	E. F. for himself saith, that he is a resident

inhabitant of Upper Canada, and is a householder in (or a freeholder in) —, and that he is worth the sum of (the sum in which he stands bound by the penalty) over and above what will pay all his debts; and this deponent, G. H., for himself saith, that he is a resident inhabitant of Upper Canada, and is a householder in (or freeholder in) —, and that he is worth the sum of (as the case may be) over and above what will pay all his debts.

(Signed,)

E. F.

G. H.,

Sworn by the above named deponents, E. F. and G. H., at —, in the county of —, the — day of —, 18—, before me,

X. Y., A Commissioner, &c.

10. That fourteen day's notice shall be given of the time and place at which application will be made to the Court from whose judgment it is intended to appeal, or to a Judge thereof in vacation for the allowance of such security; which notice shall contain the name, and additions of the obligors.

11. That the allowance of such security may be opposed by affidavit; but in the absence of any such opposition, the affidavit above mentioned shall be sufficient, in the discretion of the Judge, to warrant the allowance thereof.

12. That, if allowed, the officer of the Court shall endorse on such bond the word "allowed," prefixing the date and signing his name thereto; upon which, such security shall be deemed perfected.

13. That cases coming within the twelfth Victoria, chapter sixty-three, section forty, numbers two and four, shall be disposed of by special order, as the occasion may require; except that the security thereunder shall be personal and by bond as aforesaid.

14. That if in any case judgment shall be hereafter given in any of the said Courts upon a question of law not appearing upon the record, but which judgment would be subject to be reviewed in error, if the question thereby determined were presented to the Court on a special verdict, or by bill of exceptions or demurrer to evidence, that in every such case the judgment so given may be appealed from, notwithstanding the question shall not appear on record.

Provided, 1st.—That before the expiration of three calendar months from the day on which the decision shall be pronounced, the party intending to appeal shall, by his attorney, file in the office of

the clerk of the Court in which the cause shall be or shall have been depending, and shall serve upon the opposite party, his attorney or agent, a notice to the following effect :

"The plaintiff (or defendant as the case may be) intends to appeal from the judgment of the Court upon the *rule nisi* for non-suit or for new trial" (or as the case may be.)

2nd.—That the execution be not stayed unless security be given as in other cases of appeal.

3rd.—That in case of any appeal under this rule, the party appealing shall prepare a written statement of the case, and of the question determined, and of the judgment and decision thereon from which he appeals ; which, being signed by both parties or their respective attorney or attorneys, and approved of by one of the Judges of the Court appealed from, shall be transmitted with the transcript of record certified by the clerk.

4th.—That in case the parties or their attorneys shall not agree in such statement, then the appellant may, on summons to the opposite party apply to a Judge of the Court appealed from to approve of the statement to be submitted to him ; which Judge, on hearing the other party, or in case of his non-attendance, on hearing the appellant, may approve or modify the statement, as to him shall appear proper.

5th.—That the Court of Appeal may, in its discretion, remit such statement to be amended as may appear necessary for more correctly exhibiting the point or points which have been determined in the Court below.

6th.—That when the Court of Appeal shall have determined the matters brought before them under this rule, they shall certify their decision, and send the same to the Court below, with such order as to entering judgment for either party or otherwise, as the case shall appear to them to require.

15. That the writ of appeal from either of the said Common Law Courts, upon being presented to the chief clerk of the Court appealed from, shall by endorsement thereon, be allowed by him if the appellant has given the requisite security, such allowance to be as follows :

Allowed the — day of —, 18—.

(Signature of the Clerk.)

And that when allowed, the said clerk, on payment of legal fees, shall proceed to comply with the order of the writ, and the Chief Justice or some other Judge of the Court appealed from, shall endorse a return thereon as follows :

By virtue of the within writ, the record and proceedings therein mentioned, are sent under the seal of the Court of —, as within it is commanded ; such record and proceedings being contained in the transcript thereof hereunto annexed and signed by (officer's name), clerk of the said Court.

(Signed,)

Chief Justice (or Judge.)

16. That the clerk of the Court shall, in order to such return, cause a fair and full transcript of the judgment appealed from, certified under the seal of the Court and signed by him, to be affixed to the writ of appeal ; which transcript, so certified and transmitted, with such further certificate as may be required in cases under the fourteenth rule, shall be deemed a sufficient compliance with the writ.

17. That if any writ of appeal be not duly returned, a rule to return the same may be obtained at any time as of course, on filing a motion paper therefor, with an affidavit of the allowance of the writ and the delivery thereof to the clerk of the Court appealed from, at least fourteen days previous to such application and of its non-return.

18. That if not returned within four days after service of such rule on the Chief Justice or some other Judge, and on the chief clerk of the Court appealed from, special application for further proceedings must be made to the Court of Error and Appeal, upon a special affidavit of the circumstances.

19. The further time to return such writ may be had upon application to the said Court of Error and Appeal, or to any Judge thereof.

20. No rule to allege diminution, nor rule to assign causes of appeal, nor *scire facias quare executionem non*, shall be necessary, in order to compel an assignment of errors.

21. No rule to certify or transcribe the record shall be necessary ; and if the appellant does not, in eight days after the filing of the return of the writ of appeal, file and serve a copy of his grounds of appeal, the respondent may, by notice in writing, demand the same ;

and if the grounds of appeal are not filed within eight days after service thereof on the appellant, his attorney or agent, the appeal, on proof thereof by affidavit, shall be dismissed with costs.

22. That within eight days after the grounds of appeal shall be filed and served, the respondent shall file and serve his answer or joinder thereto ; which, unless it shall be necessary to plead specially shall be the common plea or joinder of "*in nullo est erratum* ;" or if he neglects to do so, the appellant may in writing demand the same ; and unless the respondent file his answer or joinder in appeal within eight days after service of such demand, the respondent, his attorney, or agent, shall be precluded from filing the same, without the leave of the Court or a Judge thereof first had and obtained upon a *rule nisi* or summons ; and the Court will proceed *ex parte* to hear the cause on the part of the appellant, and to give judgment therein without the intervention of the respondent.

Provided always, that either party respectively may obtain further time to file the grounds of appeal, or the answer or joinder thereto, by the order of the Court or of any Judge thereof, upon the return of a *rule nisi* or summons to be issued and served in that behalf.

Provided also, that if the respondent does not intend to resist the appeal, he may give notice thereof to the appellant ; and on proof of such notice, judgment of reversal shall be given for the appellant as of course.

Provided also, that in case the grounds of appeal are not filed and served eight days next before the first day of July in any year, then the respondent shall be allowed as many days after the twenty-first day of August next following as will be sufficient to complete such number of eight days within which to file his answer or joinder thereto.

23. That when the grounds of appeal and answer thereto are filed the cause shall, on application of either party, be set down for argument by the Clerk of this Court, for a day to be fixed, of which notice shall be duly given to the opposite party, his attorney or agent, at least four days before the day appointed for the hearing of such appeal.

24. Four clear days before the day appointed for argument, the appellant shall deliver to the Clerk of the Court of Error and Appeal, for the use of the Judges thereof, two copies of the judgment

of the Court below, and of the reasons of appeal, and of the pleadings or answers thereto ; and in default thereof the appeal may be dismissed with costs.

25. That the result of the appeal in this Court shall be certified to the Court appealed from by the Clerk under the seal of this Court, which certificate shall briefly state that the judgment has been affirmed, reversed or modified (as the case may be,) with or without costs ; and when with costs, to be paid by either party, adding the amount thereof when the same shall have been taxed, as taxed ; and that upon such certificate being filed in the Court below, any entry thereof may be suggested on the roll, and further proceedings in that Court be had, according to the course and practice of such Court ; and in case of any new question arising, according to the course and practice of the Court of Queen's Bench in England.

Provided that the respondent, if the successful party, may proceed upon the judgment by execution, and upon the bond or security required to be given under the statute and the foregoing rule in that behalf ; or he may adopt either course separately, without prejudice to his other remedy by waiver, delay or otherwise.

26. That all writs and all rules and orders of this Court in cases appealed shall be tested or bear date the day of their issuing, and be signed by the Clerk of the Court.

27. That no writ of appeal shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of appeal intended to be argued. Provided, that if the error stated in such notice shall appear to be frivolous, the Court or a Judge, upon summons and proof of the service thereof by affidavit, may order execution to issue.

28. That in appeals from the Court of Chancery, all securities under the fortieth section of the said Act of the Provincial Parliament, passed in the twelfth year of the reign of her present Majesty, chapter sixty-three, shall be in the form of a bond, which, together with the affidavit of justification, shall be filed with the Registrar of the said Court, and notice thereof served on the respondent, his solicitor or agent ; and the same shall stand allowed, unless the respondent shall within fourteen days after service of such notice move the said Court to disallow the same. A special application shall be necessary to stay proceedings under any of the exceptions in the said section of the said act.

29. That the petition of appeal shall be in the form set forth in the schedule to this order. The petition of appeal shall be filed with the Clerk of the Court, and a copy thereof, together with a notice of the hearing of the appeal shall be served on the respondent, his solicitor or agent, at least two months before the time named in such notice for the hearing of the appeal. Such petition shall not be answered, but at the time named in such notice the parties must attend to argue the appeal; and upon the filing of the petition, and service of a copy thereof and of such notice, the appeal shall stand in the same plight as if the petition had been answered, and such time appointed by this Court for the hearing thereof.

The Schedule to the foregoing Order.

IN THE COURT OF ERROR AND APPEAL.

Between ———, appellant, and ——— respondent.

To the Honourable the Judges of the said Court.

The humble petition of the said (appellant) sheweth :

That a (decree or an order) was lately and on ——— pronounced by her Majesty's Court of Chancery for Upper Canada, in a certain cause depending in the said Court wherein your petitioner was ——— and the above named ——— was ——— ; which said (decree or order) has since been duly entered and enrolled.

That your petitioner feels himself aggrieved by the said (decree or order), and he hereby appeals therefrom, and humbly prays that the same may be reversed or varied, or that your lordships will make such other order or decree in the premises as to your Lordships shall seem meet.

And your petitioner will ever pray; &c.

(Certificate of Counsel.)

30. That the printed cases shall be and are hereby abolished, but copies of the pleadings and evidence shall be printed, as is at present done in the appendix to the case, to which the reasons of appeal, and for supporting the decree or order, shall be appended; and the same rule shall apply to such printed copies and reasons as now apply to the printed cases, and the same shall for all purposes be considered the printed cases of the appellant and respondent respectively. Provided always, that nothing herein contained shall prevent the parties from joining in printing such copies as they now do in printing the appendix, if they shall be so disposed. Such printed

cases must be deposited with the clerk of the Court for the use of the Judges, at least four days before the hearing of the appeal.

31. That when it shall be intended to appeal to Her Majesty in the Privy Council, the securities required by the statute twelfth Victoria, chapter sixty-three, section forty-six, shall be personal and by bond to the respondent or respondents—such bond to be executed by the appellant or appellants, or one of them, and two sufficient sureties (or if the appellant or appellants be absent from or do not reside in Upper Canada, then by three sufficient sureties) in the penal sum of five hundred pounds, in cases coming within the first part of the said section forty-six; the condition of which bond shall be to the effect that the appellant (or appellants) shall and will effectually prosecute his (or their) appeal, and pay such costs and damages as shall be awarded in case the judgment (or decree) appealed from shall be affirmed, or in part affirmed, and that execution shall not be stayed in the original cause until security shall further be given by bond, in conformity to the sixth, seventh and eighth rules, when from the nature of the case such further security shall be requisite: and in cases from Chancery, application to the Court of Appeal to stay proceedings shall be by motion or notice; which motion, if granted, shall be upon such terms as to security under the statute or otherwise, as the circumstances and nature of the case require.

32. That the bond or security referred to in the last rule shall be in the following form:

Know all men by these presents, that we A. B., of —, C. D., of —, and E. F., of —, are jointly and severally held and firmly bound unto G. H., of —, in the penal sum of — of lawful money of Canada, for which payment well and truly to be made, we bind ourselves, and each of us by himself, our and each of our heirs, executors and administrators respectively, firmly by these presents. Witness our hands and seals respectively, the — day of —, in the year of our Lord —.

Whereas, [the appellant] alleges and complains, that in the giving of judgment in a certain suit in her Majesty's Court of Error and Appeal in Upper Canada, between (the respondent) and (the appellant) — manifest error hath intervened: wherefore the said (appellant) desires to appeal from the said judgment to Her Majesty in Her Majesty's Privy Council:

Now the condition of this obligation is such, that if the said ap-

pellant do and shall effectually prosecute such appeal and (or) pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed from shall be affirmed, or in part affirmed, then this obligation shall be void otherwise shall remain in full force.

33. That in every case of appeal to Her Majesty in Council, the obligors, parties to any bond as sureties, shall justify their sufficiency by affidavit, in the manner and to the same effect as is required by rule number nine of this Court.

34. In cases appealed from either of the Courts of Common Law, or from the Court of Chancery, the same fees and allowances shall be taxed in appeal by the clerk of the Court of Error and Appeal for attorneys and solicitors, or any officer of the said Court, as are allowed for similar services in the Court from which the appeal shall have been brought; and that counsel's fees shall be taxed in the discretion of the clerk, provided that no fee to counsel exceeding ten pounds shall be taxed without an order of the Judge who presided on the argument, or in his absence of the next senior Judge.

35. That the regular and appointed days or times of sitting of this Court shall be the second Thursday after the several terms of Hilary, Easter, and Michaelmas, as appointed by the statute 12 Vic., ch. 63, sec. 13, at eleven o'clock in the forenoon: provided however, that the said Court may adjourn from time to time, and meet at such other periods as shall be appointed for the hearing and disposing of any business brought before it.

ORDER 27TH JUNE, 1856.

Ordered that copies of the pleadings and evidence shall be printed in all cases appealed, together with the reasons of appeal, and the reasons relied upon for supporting the judgment, decree or order; and the opinions of the Judges in the Court below, when not published in the Reports; which copies shall, for all purposes, be considered the printed cases of the appellant and respondent respectively, and a copy must be deposited with the Clerk of the Court for the use of each of the Judges at least four days before the hearing of the appeal.

ORDERS 21st DECEMBER, 1858.

It is ordered that, after the present sittings of this Court, the Clerk shall receive no appeal books unless they be printed, on one side only, on good paper, in demi quarto form, with small pica type

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It is ordered that in all cases in which the case for appeal is re-
quired to be settled by any Judge of either of the Courts ; the ap-
pellant shall serve on the opposite party a copy of the case he in-
tends to submit for the Judges' approval, at least four days before
the application to have the case settled.

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APPENDIX OF FORMS.

I.—DEMURRERS.

1. *For want of parties.**(Style of cause.)*

The Demurrer of the defendant C. D. to the Bill of Complaint of A. B., the above named plaintiff.

The defendant by protestation not confessing all or any of the matters or things in the plaintiff's bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged doth demur to the said bill; and for cause of demurrer sheweth that it appears by the said bill that there are not proper parties thereto, inasmuch as it appears upon the face of the said bill that the creditors of the said F. C. other than the said plaintiff, who executed the instrument or document in the bill mentioned, are necessary parties to the said bill by name, but yet the plaintiff, has not made the said creditors parties to the said bill by name; whereupon, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto and humbly demands the judgment of this honourable court whether he shall be compelled to make any further or other answer to the said bill, and prays to be dismissed with his costs and charges in this behalf most wrongfully sustained.

2. *For want of Equity.**(Style of cause.)*

This defendant by protestation, &c. (as in No. 1); and for cause of demurrer sheweth that the plaintiff hath not in and by his said bill made and stated such a case as entitles him in a Court of Equity to any relief against this defendant as to the matters contained in the said bill or any of such matters; whereupon and for divers other good causes of demurrer appearing in the said bill the defendant doth demur thereto and demands the judgment of this Court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs in this behalf most wrongfully sustained.

3. *For want of Equity and want of parties.*
(*Style of cause.*)

These defendants by protestation, &c., (as in No 1.), do demur thereto, and for causes of demurrer shew : That the said bill doth not contain sufficient matter of equity whereupon this Honourable Court can ground any decree in favor of the said complainant or give the complainant any relief as against these defendants, and further that, it appears by the plaintiff's own shewing in the said bill that a personal representative (*as the case may be*) of G. H., deceased, in the said bill mentioned, is a necessary party to the said bill ; but yet the said complainant hath not made any such personal representative of the said G. H., deceased, a party to his said bill, and thereupon and for divers other good causes of demurrer in the said bill contained, these defendants do demand the judgment of this Honourable Court, whether they shall be compelled to make any further or other answer to the said bill, and they pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

II.—PETITIONS.

4. *Petition to have a person declared a lunatic and a committee appointed over his person and property.*

In Chancery.

In the matter of R. B., of the
City of Toronto, in the County of
York, baker, a supposed lunatic.

To the Honourable, &c.

The humble petition of T. L. B., of the City of Toronto, in the County of York, carpenter, sheweth :—

1. The above named R. B., who is your petitioner's father, on or about the — day of —, became a lunatic as your petitioner is advised and doth verily believe, and he hath since the — day of —, been an inmate of the Provincial Lunatic Asylum at Toronto.

2. Before the said — day of —, the said R. B. carried on the business of a baker, in the City of Toronto.

3. The said R. B. was on the said — day of —, and still is seized of or entitled to certain real estate, consisting of —.

4. The said R. B. was not possessed of any personal property except the household furniture in his dwelling house on ——— Street, and the same is still in the said house and used by his wife and the other members of the family.

5. The said R. B. was not indebted to any person in any amount whatever, and there is no charge or incumbrance upon his real estate or any part thereof.

6. The rents of the said houses amounting to the sum of ———, per annum, have since the said ——— day of ———, been applied in payment of the sum of \$ ———, charged for maintenance of the said R. B., in the said Asylum, and the remainder has been expended in the maintenance of his wife, and in the maintenance and education of his infant children.

7. The family of the said R. B. consists of his wife, H. B., and his children, your petitioner, &c.

8. The said R. B. is wholly incapable of transacting any business, or of managing his affairs and property, and your petitioner, and the other members of the family, are desirous that a commission of lunacy should issue out of this Honourable Court, to enquire as to the alleged lunacy of the said R. B., or that he may be declared by the order of this Honourable Court to be a lunatic, and that some fit and proper person may be appointed committee of the person and estate of the said R. B.

9. Your petitioner therefore prays :—

1. That a commission of lunacy may issue under the seal of this Honourable Court to enquire as to the alleged lunacy of the said R. B., or
2. That the said R. B. may be declared by the order of this Honourable Court to be a lunatic.
3. That some proper person may be appointed committee of the person and estate of the said R. B.
4. That such other order may be made as may to this Honourable Court seem proper.

And your petitioner will ever pray.

5. *Petition by Solicitors for taxation of Bill of Costs.*

In Chancery.

In the matter of A. B., and E. B.,
Solicitors of this Honourable Court.

To the Honourable the Judges of the Court of Chancery.

The petition of A. B., of the City of Toronto, gentleman, and of
E. B., of the same place, gentleman, solicitors of this Honourable
Court,

Sheweth,

1. That your petitioners were employed by X. Y., as his solicitors in a certain suit, wherein the said X. Y. was plaintiff, and C. D. and E. F. were defendants.

2. On the ——— day of ———, last your petitioners delivered, as by affidavit appears, a bill of their fees, charges and disbursements in the said suit, which said bill was subscribed by your petitioners according to the statute in such case made and provided.

3. The said X. Y. has made no application to have the said bill taxed, although more than one month has elapsed since the said bill was so delivered.

4. No action at law has been brought by your petitioners in respect of their said bill, and the same remains unpaid.

5. The only parties interested in the costs and disbursements in the said suit are your petitioners.

Your petitioners therefore pray,

1. That it may be referred to the Master of this Court to tax to them the said fees, charges and disbursements, and that the said X. Y. may be ordered to pay the same to your petitioners immediately after such taxation and that the order to be made herein may contain all usual directions

and that your petitioners may have such further or other relief as may seem meet.

And your petitioners will ever pray.

6. Petition for delivery and taxation of Solicitor's Bill.

In Chancery.

In the matter of X. Y., a solicitor
of this Court.

To the Honourable the Judges of the Court of Chancery.

The petition of A. B., of the township of London, in the County of Middlesex, Yeoman.

Sheweth,

1. Your petitioner employed the above named X. Y. to take and prosecute certain proceedings in this Court against one C. D., at the suit of your petitioner.

2. Certain proceedings were taken by the said X. Y., in your petitioner's behalf.

3. The said X. Y. hath not rendered to your petitioner a bill of his fees, charges and disbursements incurred and disbursed by him in carrying on the said suit, nor has he delivered over to your petitioner the papers and documents in his possession relating to the said suit.

4. Your petitioner is desirous that the said X. Y. should deliver to him a bill of his costs, and that the same may be taxed by the proper officer of this Court, your petitioner submitting to pay what upon such taxation shall be found due to the said X. Y.

Your petitioner therefore prays,

1. That the said X. Y. may be ordered to deliver to your petitioner a bill of his costs, charges and disbursements incurred and disbursed by him in the said suit, and that the same may be referred to the

Master of this Court for taxation, and upon payment by your petitioner of what may be found to be due to the said X. Y. upon such taxation, or if it shall appear upon such taxation that the said bill is overpaid, that the said X. Y. may be ordered to deliver to your petitioner or to whom he may appoint, all papers, writings, and documents in his possession or power relating to the said suit, and that the said X. Y. may be ordered to refund and repay to your petitioner what shall appear to be due to him upon such taxation and that the said order may contain all other necessary directions

And your petitioner will ever pray.

III. AFFIDAVITS

7. *To prove mortgage debt.*

(Style of cause.)

I. A. B. of &c.

1. Under and by virtue of an indenture bearing date &c., and made between &c., I am mortgagee of the lands and premises therein comprised for securing payment of the sum of ———, together with interest thereon.

2. I have not, nor hath nor have any other person or persons by my order, or to my knowledge or belief for my use received the said principal sum of ——— or any part thereof, or the interest which accrued due thereon since the ——— day of ——— or any part thereof, or any security or satisfaction for the same respectively or any part thereof, save and except the said mortgage.

3. The whole of the said sum of ——— together with interest thereon, from the said ——— day of ———, still remains justly due and owing to me under and by virtue of the said mortgage.

4. The whole of the said sum of ——— was actually advanced by me to the defendant, upon the security of the said mortgage.

5. I am not now, and never have been since the date of the said mortgage, nor hath nor have any other person or persons by my order or to my knowledge or belief for my use, been in the occupation of the said mortgaged premises or of any part thereof, nor in receipt of the rents, issues or profits of the same or any part thereof.

8. *Of plaintiff for final order of Foreclosure.*

1. I have not nor hath nor have any person or persons by my order, or to the best of my knowledge, information or belief for my use, received the sum of ——— being the amount found due to me by the report of the Master at ——— in this cause, or any part thereof, or any security or satisfaction for the same or for any part thereof, but the whole of the sum of ——— remains justly due and owing to me under the mortgage security in question in this cause

2. I am not now, and since the date of the said mortgage, never have been, nor hath nor have any person or persons by my order or for my use, been in possession of the lands and premises comprised in the said mortgage, or of any part thereof, nor in receipt of the rents, issues and profits of the same or of any part thereof.

9. *Of Execution.*

1. On the ——— day of ——— I was present and did see A. B., manager of the Branch or Agency of the ——— Bank at ———, sign the certificate hereunto annexed at ———, in the county of ———.

2. The name "A. B." subscribed thereto is the proper handwriting of the said A. B., and the name "C. D." subscribed as witness is my handwriting.

10. *Verifying account of personal estate.*

(*Style of cause.*)

We, A. B., of &c., and C. D., of &c., and E. F. of &c., severally make oath and say as follows :

1. We have according to the best of our knowledge, remembrance, information and belief, set forth in the first schedule hereunder written a full, true and particular account and inventory of the



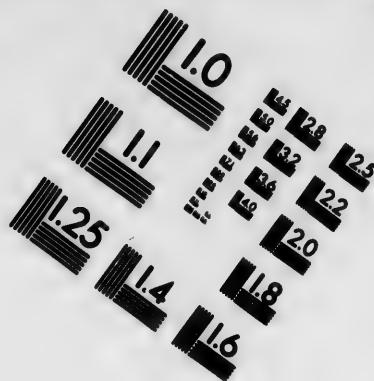
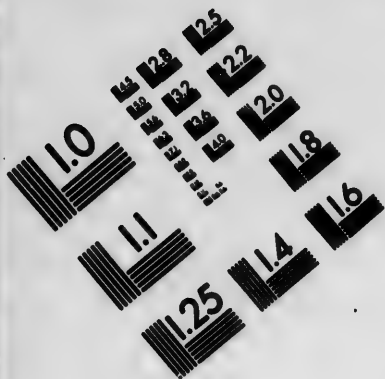
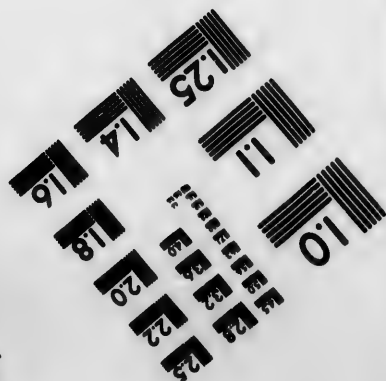
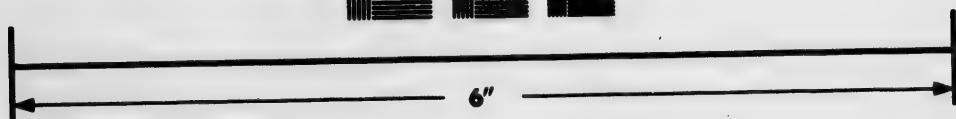
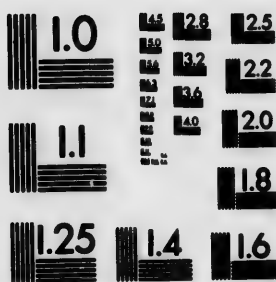


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personal estate of or to which ——— the testator in the decree dated ——— made in this cause named or referred to, and who died on the ——— day of ———, was possessed or entitled at the time of his death, (*and not by him specifically bequeathed.*)

2. Save what is set forth in the said first schedule, (*and what is by the said testator specifically bequeathed,*) the said testator was not to the best of our knowledge, information, or belief at the time of his death possessed of or entitled to any debt or sum of money due to him from us, or any or either of us, on any account whatsoever, nor to any leasehold or other personal estate, goods, chattels, or effects, in possession or reversion, absolutely or contingently, or otherwise howsoever.

3. The said testator's funeral expenses have been paid and the same consist of the items of disbursement numbered — and — in the account hereinafter referred to.

4. We have in the account marked A., now produced and shown to us, according to the best of our knowledge, information and belief set forth a full, true and particular account of the personal estate of the said testator (*not by him specifically bequeathed*) which has come to our hands or to the hands of any other person or persons by our or any or either of our order, or for our or any or either of our use, with the times when the names of the persons from whom, and on what account the same has been received, and also a like account of the disbursements, allowances, and payments made by us, or any or either of us in respect of or on account of the said testator's funeral expenses, debts and personal estate, together with the times when, the names of the persons to whom, and the purposes for which, the same were disbursed, allowed or paid.

5. And we each speaking positively for himself, and to the best of his knowledge and belief as to other persons, further say, that save and except as appears in the said account marked A., we have not, nor hath any or either of us, nor have nor hath any other person or persons by our or any or either of our order, or for our or any or either of our use, possessed, received or got in any part of the said testator's personal estate, nor any money in respect thereof, and that the said account marked A., does not contain any item of disbursement, allowance, or payment, other than such as has actually been disbursed, allowed or paid on the account aforesaid.

6. We further say, that to the best of our knowledge, information and belief the personal estate of the said testator now outstanding or

undisposed of consists of the particulars set forth in the second schedule hereunder written.

7. Save what is set forth in the said second schedule there is not, to the best of our knowledge, information or belief, any part of the said testator's personal estate now outstanding or undisposed of.

Sworn &c.

The first schedule above referred to.

\$100 cash in the house.

\$440 in the Bank of Toronto.

\$320 debt due from R. O'Brien.

\$320 promissory note of John Smith.

\$1600 due from R. Moore on bond.

\$80 debt due from David Kerr.

The second schedule above referred to (set out particulars in same manner as above.

[For account see next page.]

(Style of cause.)

This account marked A., was produced and shewn to A. B., C. D. and E. F., and is the account referred to in their affidavit, sworn this——day of——, before me. X. Y.

No. of Ac't	Date.	RECEIPTS.				DISBURSEMENTS.	
1	1862. May 1.		Found in house.	1	1862. May 7.	John Ross.	Undertakers Bill. \$110 00
2	"	E'k of Toronto.	Cash in Bank. 440 00				
3	June 4.	John Smith.	Proms'ry Note. 200 00	2	" 15.	Surrogate Clerk	Probate of Will. 21 00
4	June 10.	R. Moore.	Bond Debt. 1600 00	3	June 16.	Dr. Bell.	Medical attend- ance. 60 00
5	Oct. 3.	David Kerr.	Debt due testa- tor. 210 00	4	July 9.	Wood & Co.	Promis'ry Note. 700 00

10. *Verifying account of Real Estate.*

(Style of cause.)

4	June 10.	R. Moore.	Bond Debt.	1600 00	3	June 16.	Dr. Bell.	Medical attendance.	60 00
5	Oct. 3.	David Kerr.	Debt due testator.	210 00	4	July 9.	Wood & Co.	Promissory Note.	700 00

1. We have, according to the best of our knowledge, remembrance and belief, set forth in the schedule hereunder written, the particulars of all the real estate which the testator in the decree, dated &c., made in this cause named or referred to, and who died on the _____ day of _____ was seized of or entitled to at the date of his will and at the time of his death.

2. Save what is set forth in the said schedule the testator was not to the best of our knowledge, information or belief, at the date of his will or at the time of his death seized of or entitled to any real estate in possession, remainder or reversion absolutely, contingently or otherwise howsoever.

3. We have, according to the best of our knowledge, information and belief, set forth in the schedule hereunder written, the particulars of all the incumbrances affecting the said testator's real estate, and what part thereof such incumbrances respectively affect.

4. We have in the account marked B., now produced and shown to us, according to the best of our knowledge, information and belief, set forth a full, true and particular account of all the rents and profits of the said testator's real estate which have come to our hands or to the hands of any or either of us, or to the hands of any person or persons by our or any or either of our order, or for our or any or either of our use, and the time when, the names of the persons from whom, on what account, in respect of what part of such estate the same have been received, and the times when the same became due, and also a like account of the disbursements, allowances, and payments made by us or any or either of us in respect of the said testator's real estate, or the rents and profits thereof, and the times when, the names of the persons to whom, and the purposes for which the same were made.

5. We each speaking positively for himself, and to the best of his knowledge and belief as to other persons, say that save and except as appears in the said account marked B., we have not nor hath any or either of us, nor hath nor have any other person or persons by our or any or either of our order or for our or any or either of our use, possessed, received or got in any rents or profits of the said testator's real estate nor any money in respect thereof, and that the said account marked B. does not contain any item of disburse-

ment, payment or allowance other than such as has actually been disbursed, paid or allowed as above stated.

Sworn &c.

11. *Verifying Receiver's Account.*

I———of———the Receiver appointed in this cause make oath and say

1. I say that the account now produced and shown to me marked with the letter A., purporting to be my account of *(the rents and profits of the real estate and of the outstanding personal estate of A.B. the testator in this cause)* from the———day of———186———to the———day of———186———both inclusive, contains a true account of all and every sum and sums of money received by me or by any other person or persons by my order, or to my knowledge and belief to my use, on account or in respect of *(the said rents and profits accrued due on or before the last mentioned day or in respect of the personal estate)* other than and except what is included as received in my former accounts sworn to by me.

2. The several sums mentioned in the said account hereby verified to have been paid and allowed, have been actually and truly so paid and allowed in the manner and for the purposes specified in the said account.

3. And I say that to the best of my knowledge and belief, the said account is just and true in all and every the items and particulars therein contained.

12. *Of publication of advertisement.*

1. The advertisement hereunto annexed marked A., appeared in the issues of the newspaper called the *Globe* published in the City of Toronto of the———days of the month of———last and of the———days of the present month, being once in each week of the *four weeks* preceding the———day of———.

(If the affidavit is made by the printer and publisher this affidavit ought to be preceded by a clause stating that fact, if by another person, by a clause stating that he has searched the files of the paper.)

13. *Of Auctioneer—sale under decree.*

1. At the time and place mentioned and under the conditions of sale specified in the annexed particulars and conditions of sale in this cause, I offered for sale by public auction the lands and premises described in the said annexed particulars of sale.

2. At the said sale, J. A. bid for the said lands the sum of _____ and being the highest bidder therefor, became and was declared to be the purchaser thereof at the price or sum of _____.

3. The said sale was conducted by me in a fair open and candid manner and according to the best of my skill and judgment.

4. The paper herenato annexed marked exhibit B., is the contract of sale signed by the said J. A.

14. *For Guardian.*

1. I knew the late J. U. of the City of Toronto, carpenter, in the bill of complaint in this cause named, and am acquainted with his family.

2. The said J. U. departed this life sometime in the month of _____, 186—, leaving him surviving the above named defendant M. U., his widow, and the defendants J. U., L. U., and S. U., his children and heirs-at-law.

3. The said J. U., L. U., and S. U., are all infants within the age of 21 years, and of the ages of six, four, and one years respectively, and are at present residing with and under the care of their mother, the said defendant M. U. at _____.

15. *For Commission.*

1. I am the plaintiff in this cause.

2. A. B. now residing at the City of Glasgow in that part of the United Kingdom of Great Britain and Ireland called Scotland, is a necessary and material witness for me in this cause, and it would be unsafe for me to go down to hearing without his evidence.

3. This application for a commission to take the evidence of the said A. B. is made in good faith and not for the purpose of delay.

IV.—NOTICES OF MOTION.

16. *For Decree.*

In Chancery,

Between A. B.....Plaintiff
and
C. D.....Defendant.

Take notice that this Honorable Court will be moved on behalf of the plaintiff on——, the —— day of ——, at ten o'clock, in the forenoon, or so soon thereafter as Counsel can be heard for a decree or decretal order, in accordance with the prayer of the plaintiff's bill, or that such other decree or order may be made as to this Honourable Court shall seem meet. And take notice that in support of such motion will be read the plaintiff's bill, (the answer of the said defendant, or such part thereof as the plaintiff shall be advised to read) and the affidavits mentioned below, this day filed, and the exhibits therein referred to.

Dated this —— day of ——, 1861.

To

E. F.,
Deft's Sol.

Yours, &c.,

X. Y.,
Plff's Sol.

The following affidavits will be read :

Affidavit of
Affidavit of

17. *For Injunction.*

(*Style of cause.*)

Take notice, &c., (as in No. 16) that an injunction may be awarded against the said defendant restraining him (state so much of the prayer of the bill as prays an injunction.)

And take notice that upon and in support of such motion will be read the plaintiff's bill filed in this cause, and the affidavits of &c., this day filed.

Dated, &c.

18. *To dissolve injunction.*

(*Style of cause.*)

Take notice, &c., (as in No. 16) for an order that the injunction awarded in this cause to the above named plaintiff, on the —— day of ——, may be dissolved, or that the terms of the said injunc-

tion may be varied, or that such other order may be made as to this Honourable Court may seem meet.

And take notice, &c., (as in No. 17.)

19. *For Receiver.*

(*Style of cause.*)

Take notice, &c., (as in No. 16) that it may be referred to the Master to appoint a fit and proper person to receive the rents and profits of the estate in the pleadings mentioned, and to allow him a salary for his care and pains, the person to be appointed first giving security to be approved of by the Master, duly to account for and to pay what he shall receive, and that the tenants may attorn and pay their rents in arrear and their growing rents, to such receiver; and that he may be at liberty to manage, as well as set or let the said estate with the approbation of the said Master, and that he may pass his accounts, and pay in his balances from time to time as the said Master shall direct.

And take notice, &c., (as in No. 17.)

Dated, &c.

20. *Appeal from Master's Report.*

(*Style of cause.*)

Take notice, &c., (as in No 16) by way of appeal from the report of the Master made in this cause on the — day of — for the following amongst other reasons :

1. For that the said Master, in and by his said report, &c., (*set out clearly and concisely the grounds of appeal.*)

And take notice that upon and in support of such motion will be read the pleadings, decree, master's report, affidavits, depositions, and other proceedings filed and taken in the office of the said Master, upon the reference to him in this cause.

Dated, &c.

21. *For order pro confesso.*

(*Style of cause.*)

Take notice that a motion will be made on behalf of the plaintiff, in Chancery Chambers, at Osgoode Hall, in the City of Toronto, on — the — day of —, at ten o'clock in the forenoon, or so soon thereafter as the motion can be made for an order that the

plaintiff may be at liberty forthwith to set this cause down to be heard, in order that the bill may be taken *pro confesso* against you.

And take notice that upon such motion will be read the affidavit of service of an office-copy of the said bill upon you, and the certificate of no answer being filed.

Dated &c.

22. *For guardian ad litem.*

(*Style of cause.*)

Take notice, (as in No. 21) for an order that one of the solicitors of this Honourable Court may be assigned as guardian to the above named defendant C. D., by whom he may answer the plaintiff's bill of complaint, and defend this suit.

And take notice that upon such motion will be read the plaintiff's bill of complaint and affidavit of service thereof, and the affidavits of A. B. and C. D., this day filed.

Dated, &c.

23. *To dismiss for want of prosecution.*

(*Style of cause.*)

Take notice, (as in No. 21) on behalf of the defendant E. F., for an order that the plaintiff's bill may be dismissed out of this Court, as against the above defendant E. F., for want of prosecution, with costs to be taxed by the Master of this Court.

And take notice that upon such motion will be read the notice of filing the answer of the said defendant, an admission of the service thereof, and the Registrar's certificate of the state of the cause.

Dated, &c.

24. *For leave to amend.*

(*Style of cause.*)

Take notice, &c., (as in No. 21) for an order that the plaintiff may be at liberty to amend his bill of complaint in this cause by (*set out proposed amendments or refer to them as annexed.*)

And take notice that upon and in support of such motion will be read the bill of complaint in this cause, the proposed amendment and the affidavit of A. B., this day filed.

Dated, &c.

25. *For a commission to examine witnesses.*

(Style of cause.)

Take notice (as in No. 21) on behalf of the plaintiff, for an order that a commission may issue in this cause for the examination of A. B. and C. D., at — in —, as witnesses in this cause on behalf of the above named plaintiff.

And take notice that in support of such motion will be read the affidavits of E. F., and G. H., this day filed.

Dated, &c.

26. *For vesting order.*

(Style of cause.)

Take notice, (as in No. 21) on behalf of —, for an order vesting in the said — the lands and premises purchased by him at the sale in this cause, on the — day of —, being the lands described as Lot —, in the particulars of sale in this cause.

And take notice that on such motion will be read the report of the Master, confirming the said sale filed on the — day of —.

Dated, &c.

27. *For delivery of Possession.*

(Style of cause.)

Take notice, &c., (as in No. 21), for an order that the defendant C. D. may deliver up possession of the lands and premises in question in this cause, being &c., within fourteen days after service, or within such other time as may be directed, and may be ordered to pay the costs of this motion.

And take notice that upon and in support of such motion will be read the final order of foreclosure in this cause, and the affidavit of &c., this day filed.

Dated, &c.

28. *To compel payment of purchase money into Court by purchaser under decree, and resale on default.*

(Style of cause.)

Take notice (as in No. 21), for an order that A. B. do, within a time to be limited by the presiding Judge, pay into this Court to

the credit of this cause, the sum of \$——, being the balance of purchase money due from him for lands purchased by him at the sale of lands in this cause on the —— day of ——, and also interest on the said sum from the time when the said purchase money was payable by the conditions of sale in this cause, and that in default of the said A. B. paying such balance of purchase money and interest, by the time appointed by the said Judge, that the lands purchased by the said A. B. may be re-sold, and the said A. B., ordered to pay the costs of such re-sale, the deficiency if any thereon and also the costs of this motion.

And take notice that upon such motion will be read the report of the Master of this Court at London confirming the said sale, dated the —— day of ——, and filed the —— day of ——, and the certificate of non-payment by the said A. B.

Dated &c.

V.—NOTICES.

29. *Of filing answer or demurrer.*

(Short style of cause.)

Take notice that the answer (or demurrer) of the defendant C. D. has this day been filed.

Dated, &c.

To E. F. Plaintiff's Solicitor.

S. T. Defendants' Solicitor.

30. *Of filing replication.*

(Short style of cause)

Take notice that the plaintiff has this day filed the replication in this cause.

Dated, &c.

31. *Of production.*

(Short style of cause.)

Take notice that the plaintiff (or defendant) has this day filed his affidavit on production of books and papers, and has deposited the documents therein mentioned in the office of the Clerk of Records and Writs (or Deputy Registrar.)

Dated &c.

32. *To inspect papers produced.**(Short style of cause.)*

Take notice that I will attend at the office of the Clerk of Records and Writs on ——— next, at ——— o'clock, to examine the books and papers produced by the defendant (or plaintiff) Dated &c.

33. *Of examination and hearing.**(Style of cause.)*

To the above named defendant C. D.

Take notice that this cause has been set down for the examination of witnesses at ——— on the ——— day of ———, at which time and place the witnesses for all parties must be examined, and the cause heard, and unless you attend at the time and place appointed a decree may be pronounced in your absence. Dated, &c.

34. *Of hearing on further Directions.**(Style of cause.)*

To the above named defendants.

Take notice that this cause has been set down to be heard on further directions (and as to the matter of costs) on ——— the ——— day of ———, and unless you attend at the time and place appointed, a decree may be pronounced in your absence.

Dated &c.

VI. MISCELLANEOUS.

35. *Bond for security for Costs.*

IN CHANCERY,

(Style of Cause.)

Know all men by these presents that I, J. Y., of ———, farmer, am held and firmly bound to A. G., Esquire, Registrar of the Court of Chancery for Upper Canada, in the penal sum of \$—— of good and lawful money of Canada, to be paid to the said A. G., his certain attorney, executors, administrators or assigns, for which payment to be well and faithfully made I bind myself, my heirs, executors and administrators firmly by these presents, sealed with my seal

and dated this — day of — in the — year of the reign of Our Sovereign Lady Queen Victoria, and in the year of our Lord 186—.

Whereas, A. B. and C. D. have lately exhibited their bill of complaint in the said Court of Chancery against E. F. and G. H., defendants, touching the matters therein contained.

Now the condition of the above written obligation is such, that if the above bounden J. Y., his executors or administrators, do and shall well and truly pay or cause to be paid to the said (*if the bond be given to all the defendants*, "to the defendants in the said cause"), all such costs as the said Court shall think fit to award to the said defendant (*or*, "to any or either of them") in the said cause, then the above written obligation to be void, &c.

36. Bond by Receiver.

Know all men by these presents that we, A. B., of —, C. D. of —, and E. F. of —, are jointly and severally held and firmly bound unto A. N. B., Esquire, Master of the Court of Chancery, in the penal sum of —, lawful money of Canada, for which payment well and truly to be made, we bind ourselves, and each of us by himself, our, and each of our heirs, executors and administrators respectively, firmly by these presents.

Witness our hands and seals respectively, the — day of — in the year of our Lord —.

Whereas, by an order of the Court of Chancery for Upper Canada, made in a cause wherein — are plaintiffs, and — defendants, and bearing date the — day of —. It was ordered that it should be referred to the Master of this Court to appoint a proper person to receive, (*or*, upon the above bounden A. B., first giving security to the satisfaction of the said Master, he should be appointed receiver of) the rents and profits of the real estate, and to collect and get in the outstanding personal estate of —, in the said order named. And whereas, the said Master hath appointed and approved of the above bounden C. D. and E. F., as sureties for the said A. B., and hath also approved of the above written obligation with the underwritten condition as a proper security to be entered into by the said A. B. and C. D. and E. F., pursuant to the said order and the general orders of the said Court in that behalf, and in testimony of such approbation, hath signed an allowance in the margin hereof.

Now the condition of the above written obligation is such, that if the said A. B. do, and shall duly account for all and every, the sum and sums of money which he shall so receive on account of the rents and profits of the real estate, and in respect of the personal estate of the said X. Y., and do and shall duly pay the balances which shall from time to time be certified to be due from him at such periods as may be directed, then the above obligation shall be void and of none effect, otherwise the same is to be and remain in full force and virtue.

—year of the
the year of our

their bill of com.
and G. H., de-

is such, that if
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the said cause"),
ard to the said
aid cause, then

—, C. D.
severally held
f the Court of
ney of Canada,
bind ourselves,
executors and

— day of —

Upper Canada,
— defend-
It was ordered
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—, in the
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as a proper
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the said Court
ath signed an

IN CHANCERY :

37. Receiver's Account.
(Style or Cause.)

The second account of A. B., the Receiver appointed in this cause by an order bearing date the --- day of --- to receive the rents and profits of the real estate, and to collect and get in the outstanding personal estate of the testator in this cause named, from the --- day of ---, 1862, to the --- day of ---, 1863.

REAL ESTATE—RECEIPTS.

No. of Item.	Date when received.	TENANT'S NAME.	PREMISES.	Annual Rent.	Arrears due at ---	Amount due at ---	Amount received.	Arrears remaining due.	REMARKS.
1	1862	John Doe.	Lot 13, 4th con. of Vaughan, County of York.	\$ c.	\$ c.	\$ c.	\$ c.	\$ c.	
2	"	Richard Doe.	House No. 120 Queen Street, Toronto.						

PAYMENTS AND ALLOWANCES.

No. of Item.	Date when paid or allowed.	NAME OF PERSON.	FOR WHAT PURPOSE.	AMOUNT.
1		John Smith.	Bill for repairs of house on Queen Street, Toronto, let to R. Roe.	\$ c.
2		Liverpool Insurance Co.	One year's Insurance of --- due.	

RECEIPTS. **PERSONAL ESTATE.** **PAYMENTS AND ALLOWANCES.**

No. of Item.	Date when received.	Name of person from whom received.	On what account.	Amount.	No. of Item.	Date when paid or allowed.	Name of person to whom paid or allowed.	For what purpose.	Amount.
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Summary

Amount of balance due from Receiver on account of real estate on last account.....	\$ 200
Amount of receipts on the above account of real estate.....	1,000
Balance of last account paid into Court.....	200
Amount of payments and allowances on the above account of real estate.....	800
Amount of Receiver's costs of passing this account, as to real estate ...	50
Balance due from Receiver on account of real estate.....	
Amount of balance due from Receiver on account of personal estate on last account.....	200
Amount of receipts on above account of personal estate.....	1,000
Balance of last account paid into Court.....	200
Amount of payments and allowances on above account of personal estate.....	800
Amount of Receiver's costs in passing this account of personal estate	40
Balance due from Receiver on account of personal estate.....	

1	John Smith.	Bill for repairs of house on Queen Street, Toronto, let to R. Roe.	\$ C.
2	Liverpool Insurance Co.	One year's Insurance of ———— due.	

38. *Condition of bond by the guardian or the persons and property
or male and female infants.*

Obligation and recital as in receiver's bond ante, mutatis mutandis.

Now the condition of this obligation is such, that if the above bounden A. B. do and shall according to the practice of the said Court, as often as he shall be required, make a just and true account of the personal estate and the rents and profits of the real estate of the said G. F. and M. F., or of either of them as now are, or shall hereafter come to the hands, custody or possession of the said A. B., and which he may receive out of or concerning the said estate, and shall carefully observe, perform and keep the orders and directions of the said Court, touching or concerning the said G. F. and M. F., or either of them, or their, his or her estate, and touching all such moneys as shall remain due upon the foot of his account duly taken by the said Master, and shall be careful to see the houses, buildings and structures of the said G. F. and M. F., and of each of them to be well and sufficiently repaired, and so kept and maintained, during the continuance of the said wardship, and shall carefully preserve and keep all the deeds, evidences and writings touching the lands and estate of them the said G. F. and M. F., or either of them as now are, or hereafter shall come to his hands, custody or possession, and shall provide for the persons of the said G. F. and M. F., and for their safety, and shall not sell or alienate his interest in the said custody or wardship, to any person or persons whomsoever without the order of this Court having been first obtained in that behalf, and do and shall not permit or suffer the said G. F. or M. F., or either of them, during the said wardship, to marry without the consent of the Court, but shall in all things demean himself as a careful and faithful guardian of the person and estates respectively of them the said G. F. and M. F., then the above obligation shall be void, &c.

sons and property

mutatis mutandis.

that if the above practice of the said a just and true account of the real estate, and touch the said G. F. estate, and touch the foot of his account, to see the house, M. F., and of each so kept and main-ship, and shall care- and writings touch and M. F., or either hands, custody or the said G. F. and alienate his interest persons whomsoever first obtained in the said G. F. of ip, to marry with- ga demean himself and estates respec- the above obligation

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